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ABSTRACT

This book is intended primarily for Oklahoma educators, but much of the discussion is applicable to educators throughout the country. After an introductory overview of 1975 school law issues, the author devotes chapters to such diverse topics as teachers (including such issues as dismissal, assignment, tenure, and contracts), Oklahoma State Supreme Court decisions, principals, collective bargaining, maternity leave, the legal liability of school officials, and student-related issues. (IRT)

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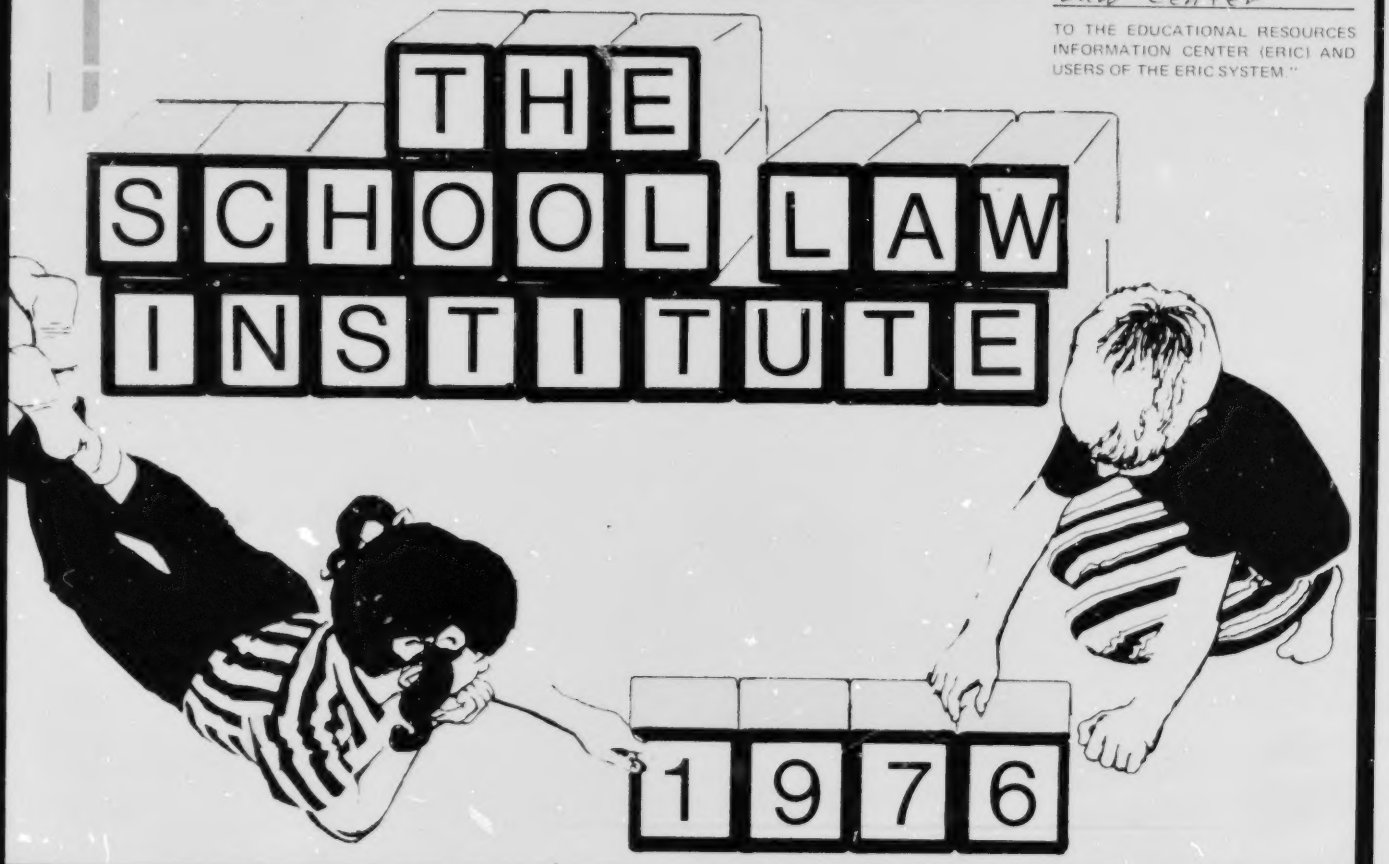

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EDUCATION LAW - 1976

By Larry L. French

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"EDUCATION LAW - 1976"

By: Larry L. French

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BIOGRAPHICAL SKETCH OF LARRY L. FRENCH

This is the fifth book on Education Law authored by Larry French and published by the Continuing Legal Education Center of the College of Law, University of Oklahoma. Prior publications include The School Administrator's Legal Handbook in 1972, Oklahoma Schoolhouse Law in 1973, The Powers and Duties of an Oklahoma School District in 1974, The Second School Administrator's Legal Handbook in 1975 and now Education Law of 1976. Mr. French is an attorney graduating from the College of Law of the University of Oklahoma in 1970. He served two years as an Assistant State Attorney General where he worked exclusively in the area of educational law. After leaving the Attorney General's office he resumed the private practice of law specializing in education law. He has written numerous articles in the area of school litigation and has lectured for various groups, both locally and nationally. He was selected as the State's Outstanding Young Lawyer in 1972.

Concurrently with his practice in the area of education law, Mr. French has been an Associate Professor of Political Science and Business Law at Seminole Junior College since 1969 and also currently represents that Institution as its legal counsel. He is a special legal advisor to the State Regents of Higher Education and represents a number of school districts throughout the State of Oklahoma. He is also an Adjunct Associate Professor in Graduate Education at the University of Oklahoma and serves quite often as

an arbitrator and impasse committee member relative to Oklahoma Negotiation Procedures. In that regard he serves as Negotiation Consultant to several school districts. He is a member of the Executive Committee of the National School Boards Association Council of School Attorneys and serves as State Chairman for the National Organization on Legal Problems of Education. He is also Secretary/Treasurer and Editor of the OSAA Proceedings Newsletter for the Oklahoma School Attorneys Association. Having previously served as Chief Counsel for the Oklahoma State School Board Association, Mr. French is now Chief Counsel for the Cooperative Council on Oklahoma School Administration and the Oklahoma Association of Secondary School Principals. He also acts as Special Legal Counsel to the Oklahoma Association of Elementary School Principals.

INTRODUCTION

This publication represents the fifth book that the Continuing Legal Education Department of the College of Law at the University of Oklahoma has published for the benefit of Oklahoma educators. As always, I am indebted to the efforts of the Director, Nancy Kenderdine, and the Editor of this publication, Helen De Bolt, and her staff, not only for their efforts in regard to this publication, but also for their continuing sponsorship of the Annual Oklahoma School Law Institute, which has become an institution within itself for professional educators of Oklahoma.

As indicated previously, the law of education is a continually changing process. Still a virtual infant in the law, education law has now found itself as a major specialization and school districts and their respective educators are continually finding the need for legal assistance, more in hope of preventing than defending litigation.

Probably the most significant case issued during 1976 by the United States Supreme Court is the case of Hortonville Joint School District No. 1 v. Hortonville Education Association, which is discussed in this book. Another case, National League of Cities v. Usery, Secretary of Labor I will introduce to you now. The United States Supreme Court ruled that the inclusion of State and local public employees under the Federal Fair Labor Standards Act is unconstitutional. Accordingly, local school districts no longer have to pay time-and-a-half overtime to their employees under Federal law. By way of background, the provisions of the Fair Labor Standards Act

when it was enacted nearly forty years ago applied only to employment in the private sector. In 1966, the Act's provisions were extended to cover employees of state hospitals, institutions and schools. That extension was upheld by the United States Supreme Court in the 1968 case of Maryland v. Wirtz. In 1974, the Act was further broadened to include any activity of any public agency, such as fire and police protection. It was these amendments that became the subject of the National League of Cities case. The Supreme Court, however, decided to go beyond the amendments at issue and overruled its own decision in the Wirtz case on the basis that Congress had overreached its constitutional powers under the Act's commercial clause, as it relates to the protection of State sovereignty and decision making.

The Oklahoma State Supreme Court has not been without school litigation during 1976 as is indicated by that particular chapter in this book. Unique issues appear to be the byword in education law. Each day raises a new question, whether in regard to negotiations, student due process, teacher terminations, taxpayer lawsuits or civil rights actions. Hopefully the information contained in this book will be of assistance to the professional educators in this State for whom it was authored.

This book is specifically dedicated to my wonderful wife, Barbara, and my three step-children, Susie, Billy and Michael. My thanks as always go to my senior law partner, W.B. Edwards, and my secretary, Elsie Rabiee, for their continued support and assistance.

CHAPTER I

A GENERAL OVERVIEW OF 1975 SCHOOL LAW

INTRODUCTION

The California Legislature recently added Section 7503.5 to the Education Code effective January 1, 1976, to read:

> "7503.5. On or after January 1, 1976, the governing board of any school district including the governing board of any community college district may initiate and carry on any program activity or may otherwise act in any manner which is not in conflict with or inconsistent with or pre-empted by any law and which is not in conflict with the purposes for which school districts are established."

School districts have generally been regarded as having only those powers which are specifically granted to them by their respective state legislature. The foregoing provision obviously reacts contra to that premise.

School attorneys spend an excessive amount of time, as do the various offices of the Attorney's General, determining whether or not a school district can take certain action. An example would be a recent opinion issued by your author relative to the question of whether or not an Oklahoma school district could legally pay the professional dues of its employees. The powers and duties section of the Oklahoma School Code (Title 70, O.S., 1971, Section 5-117) states:

> "The board of education of each school district shall have power to elect its own officers; to make rules and regulations, not inconsistent with the law

> or rules or regulations of the State Board of Education, governing the board and the school system of the district; to maintain and operate a complete public school system of such character as the board of education so deem best suited to the needs of the school district; . . . ."

The "character" reference appears to be overbroad by its very nature and perhaps the payment of "dues" can therefore be included. Regardless, the contractual authority of the district would control any such expenditure.

The problem of governance of public education usually rests in the area of public expenditure. In this regard, the principal norm continues to be that before any money is expended there must be specific authorization supporting the expenditure.

In Meek v. Pittinger, 95 S.Ct. 1753 (1975):

> "Individuals and various organizations brought an action against the Pennsylvania Secretary of Education and others challenging on First Amendment grounds, the constitutionality of Pennsylvania statutes providing for state expenditures in connection with the education of students in non-public schools. A three-judge panel upheld the constitutionality of the state's textbook and instructional materials loan and auxiliary services programs, but invalidated the state's instructional equipment loan program to the extent that it sanctioned the loan of equipment which from its nature could be diverted to religious purposes. On direct appeal, the United States Supreme Court held that all but the textbook loan provisions of the statutes in question violated the establishment clause of the First Amendment as made applicable to the states by the Fourteenth Amendment."

Referring to principles laid down in past cases, the

Court identified certain tests to be a convenient, accurate distillation of efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws respecting an establishment of religion.

Those tests were stated as:

> The Statute must have a secular legislative purpose. . . It must have a primary effect that neither advances nor inhibits religion . . . The statute and its administration must avoid excessive government entanglements with religion.

The Court acknowledged that the three-point test is not easily applied and emphasized that "the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired."

Applying the tests in this case, the Court, by a 6-3 vote, struck down the portion of the Pennsylvania statute providing auxiliary services to nonpublic schools. The statute had provided for support to such services as counseling, testing and psychological services, speech and hearing therapy, and teaching services for exceptional, remedial, or educationally disadvantaged children.

The majority distinguished the aid given under the Pennsylvania statute from the "indirect and incidental benefits" to church-related shcools that flow from programs providing bus transportation, school lunches, and public

health facilities which have been held not violative of the establishment clause. The majority saw in the auxiliary services provisions "massive aid" which is "neither indirect or incidental." (Appropriated was some 12 million dollars.)

The Court stated:

> "Even though earmarked for such purposes, when it flows to an institution in which religion is so pervasive that a substantital portion of its functions are subsumed in the religious mission, state aid has the impermissible primary effect of advancing religion."

The majority was very concerned with the probability of excessive entanglement between church and state as an outgrowth of the teaching aid made available, and commented:

> ". . .[E]xcessive entanglement would be required for Pennsylvania to be 'certain,' as it must be, that . . . personnel do not advance the religious mission of the church-related schools in which they serve."

The majority went on to say:

> "The likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class that in a medieval history seminar but a diminished probability of impermissible conduct is not sufficient: The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion."

One portion of the Pennsylvania Act was upheld by a 6-4 majority. The Court approved the part of the law permitting the loan of non-religious textbooks to nonpublic school students. The Court found the loan provisions of the law in every material respect identical to the New York State loan program which it upheld in the 1968 case of Board of Education v. Allen, 392 U.S. 236.

Recently a legislator was successful in a suit against the Governor of Oklahoma when the Governor announced that he was going to utilize some surplus monies in a manner which the legislator alleged was not authorized by the State Constitution. The Supreme Court in this case ruled that the legislator was correct and the Constitution, rather than prohibiting that particular expenditure, specifically authorized and mandated the monies to be spent in a particular manner. (Wiseman v. Boren, Governor, et al., 74 O.B.A.J. 87 (Jan. 13, 1976).

Confusion abounds as to conflicts arising out of statutorily designated powers, as opposed to those powers promulgated via local board rules or regulations. As an example, it has been held that where a statute sets forth a procedure to be followed in order to establish the post of "school business administrator," and a board fails to follow that procedure, its designation of an individual as a school business administrator is improper (Barber, et al. v. Board of Education of the Town of Kearny (Dec. of N.J. Comm. of Ed., 1975). It is obvious that such board action would be invalid, as it directly conflicts with the procedure which the statute dictates.

But consider the case where the statute is silent, or perhaps provides certain broad powers and authorities at the discretion of the board. The board then adopts a policy, for example, to provide notice, statement of cause and a hearing to a non-tenured teacher. The board in this

circumstance adopts such policy knowing full well that the statutory requirement of tenure requires procedural due process only after the teacher has served three years in that particular school system. Pursuant to the Board's authority to promulgate rules and regulations and absent rescission, the absence of an explicit statutory tenure provision may not foreclose the possibility of a "property" interest being present to forestall any change of local regulation, once it has been recognized. (School District No. 1, Albany County, Wyoming, et al. v. Sweeney, 522 F. 2d 1171 (10th C.A. 1975)

In another case (Smiecinski v. Board of Eduation of the TWP. of Hanover, Dec. of N.J. Comm. of Ed. 1975) it was held that a board of education had the power to adopt a policy barring the employment of relatives of board members. In this case there was no nepotism statute requiring such prohibition. A statutory edict supersedes any power of the board of education to either extend or limit said prohibition. The source of authority is normally determinative as to the sustainment of board action.

2. STATE BOARDS OF EDUCATION AND GOVERNMENTAL AGENCIES

The powers of state boards and/or commissioners of education vary from state to state. Typically, as to state boards of education, one finds such boards classified into two categories: (1) Advisory and (2) Authoritative. Forty-eight states (all except Illinois and Wisconsin) have a state board of education. The chief state school officer is usually termed the Superintendent of Public Instruction or Commissioner of Education. Accordingly, it is difficult to analyze the appropriate role of State Boards in the context of effective public education governance.

The State of Wisconsin's state board was sued by parental taxpayers in regard to a class action to establish the entitlement of handicapped children under the equal protection guarantee, to specialized education at public expense (Panitch, et al. v. State of Wisconsin, et al., 390 F.Supp. 611 [USDCED Wis. 1974]). The Court held that the placement and appeal guideline proposals which have been submitted by the Wisconsin Department of Public Instruction were not subject to challenge on "equal protection" and "due process" grounds.

In another action, (State of Kansas, et al. v. Board of Education of Unified School District No. 398, Marion County, 511 P.2d 705 (1973)) the Supreme Court of Kansas held that the Constitutional provision dictating that the State Board of Education should have general supervision of public schools,

educational institutions and education interest of the state, contemplates that the board's supervisory powers be self-executing and that a regulation which provided that local boards should adopt rules governing the conduct of all persons employed by or attending local institutions and provide for specific procedures for their enforcement, was not void.

In a 1975 Arizona case (Rochlin v. State of Arizona, et al., 540 P.2d 643 (Ariz. 1975)) the City of Nogales and two of its resident taxpayers brought an action questioning the constitutionality of the public safety personnel retirement system. The Supreme Court held that the system was not unconstitutional on the theory that the resulting unfunded liability of state and political subdivisions is a debt subject to constitutional invitations, that state and local governments are permitted to postpone indefinitely payment of annual necessary expenses, that the giving of increased benefits grants extra compensation after rendering of services or that method of funding the system creates nonuniformity and taxation.

The power of visitation vested the state boards of education is one of general control and supervision. It authorizes state boards to supervise activities of local boards of education to keep them within a legitimate sphere of their operations and whenever controversy or dispute arises involving educational policy or proper administration of public school systems of the state, such visitorial power authorizes the board to correct all abuses of authority and to nullify all

irregular proceedings (Zeitschel v. Board of Education of Carroll County, 332 A.2d 906, Ma. 1975, see also Halsey v. Board of Education of Garrett County, 331 A.2d 306, Ma. 1975).

Somewhat in an opposite vein, state agencies cannot act as to school district reorganization (Hazelton Area School District, et al. v. State Board, 347 A.2d 324, Pa. Commonwealth 1975).

Essentially as to Commissioner decisions specifically applicable in the states of New York and New Jersey, it has been held that those decisions are reviewable as to a determination being effected by error of law (Board of Education of City School District of City v. Ambacka, 366 N.Y. Supp. 2d 760, see also Mugavin v. Nyquist, 367 N.Y. Supp. 2d 604 (N.Y.A.D. 1975)).

3. STATE STATUTES

Again, prohibitions, as opposed to grants of authority contained within statutory edicts, continue to be the subject of challenge. In the Barber case as cited herein, another issue involved a coach who was not a member of the so-called "professional staff." The commissioner ruled that, where where the statute provides that for an individual to serve as a coach he must be a member of the professional staff, then the board obviously cannot appoint one not a member to the position of coach. In New York the City School Board was ordered to fill the statutory position of Assistant Director of the Bureau of Attendance which had been vacant since 1967 (In Re: Mulroy, 14 Education Department Reporter, New York Commissioner's Decis. #8996 (1975)).

Typically, this question of a statutory edict as opposed to discretionary authority is a common question before the Courts. In Connot v. Monroe, 227 N.W. 2d 827 (Neb. 1975) the attempt of school patrons to obtain a writ of mandamus to force school board members to provide bus transportation failed. It was held to be a discretionary power of the board pursuant to the statutes.

In Massachusetts a statute required local school boards to offer a "course" if there was a petition signed by the parents of twenty students and there existed enrollment of that number. In Johnson v. School Committee of Brockton,

330 N.E. 2d 478 (Mass. Su. Jud. 1975) the court held that assuming minimal requirements are met pursuant to the statutory edict, the course of driver education constitutes a "course" and thereby boards are authorized to offer it.

Many issues are determined by virtue of the principle of "mandate" as opposed to "permissiveness." As an example, in Roberts v. Board of Directors of School District of Scranton, 341 A.2d 475 (Pa. 1975) the statute in question provided that a board of education may provide transportation to certain groups of pupils. In this case, the board elected not to provide such transportation. The Court held that in the absence of a conclusive finding of abuse of discretion by the board, an injunction may not issue to compel the board to furnish transportation.

A statute constituting certain authority may well exclude other authorities from acting. In Board of Commissioners of Newton City v. Allgood, 214 S.E.2d (Ga. 1975) the state constitution vested the school board with total authority for schools, including fixing the tax rate. The Court held that therefore county commissioners had no discretion and must levy the tax rate recommended by the school board.

While the taxpaying voters of a school district typically vest discretionary authority by virtue of their vote with their school board, some statutes limit board action subject to voter approval. In the matter of Dworakowski 15 Education Department Reporter, New York Commissioners' Decision,

No. 9093 (1975) the Commissioner held that a board of education had no legal authority to provide transportation beyond the fifteen mile limit without the approval of the voters of the district. In this case, the petitioner, another taxpayer, had requested transportation for his children. Referring again to the earlier principle indicating that when a board acts contra to a current policy of its own, the board, to avoid this problem, may always rescind prior policies prior to acting contra thereto, see Marshall v. Board of Education of North Arlington, (Decision N.J. Comm. of Ed. 1975).

Because of the constitutional prohibition against the expenditure of public funds without statutory authority, any such statute must be strictly construed (Murry v. Levitt, 366 N.Y. Supp. 2d 674 (N.Y.A.D. 1975)). In this regard it was held that a school board acted in accordance with the statutory mandate that it take delegated measures to dispose of property no longer used for school purposes (School Board of Orange County v. Fechter, 309 S.2d 549, Fla. Appel. 1975).

Essentially, the manifest purpose of the people and the legislature as expressed in the State Constitution and Statutes, is to allow flexibility in arranging for the education of the children of the state (Wilson v. Strange, 219 S.E.2d 88, Ga. 1975).

4. POWERS AND DUTIES OF SCHOOL BOARDS

Reiterating what was indicated in the Yearbook of School Law 1975, it is and has been the recognized rule of law that boards of education have only those powers that are expressed and granted or reasonably inferred to them by the legislature of the State or that have been granted to the board of education through the State Board of Education by rule or regulation. There is little question as to the power of maintenance and operation of a public school system being the prime authoritative power of a board of education.

Section 5-117 of Title 70 stipulates the powers and duties of an Oklahoma school district. This section specifically stipulates twenty-two powers of a school district. Seventeen additional powers are included within the school code, these various powers are listed as an appendix to this chapter. In the unreported decision of Hennessey, et al. v. Independent School District No. 4 of Lincoln County, Oklahoma, No. C-75-154 (Dec. 22, 1975) (now on appeal) the Court in holding for the school district in a case prosecuted by the local Parent-Teachers Association held as follows:

> "The statutes of the state give the school board the sole discretion and the use of the buildings and facilities. The Courts can only interfere if there is a clear and arbitrary abuse of discretion . . . school boards are elected by the people to operate the school in the district and this Court nor I don't feel any court should want to get in the position that every decision

> every discretionary matter of a school board ought to be brought into court. I think that's part of what is wrong with the country now, the courts have started controlling school boards and other things that ought to be matters of local concern. . . . you have a system where you run your local school by election of a school board. The election comes up every year and while I am not inferring that any board member ought or ought not to be turned out I simply say this: That if the school board is not operating the school under the policy and the manner in which the majority of the people want the board to operate, the place to remedy that is in the local school district in your local school election and not in the courts. . . ."

This ruling, which obviously contains a great deal of dicta, emphasizes more than anything the discretionary impact permitted a governing political entity. Typically, these powers referred to are broad by their very nature. The breadth is reflected in the New Jersey Commissioner decision in Manning, et al. v. Board of Education of the Township of Cedar Grove (Dec. N.J. Comm. Ed. 1975) wherein the Commissioner held that a board of education had the power to adopt rules covering lunch programs at its schools. The Court said that where a pupil brings his lunch to school, but the pupil, under the rules of the board is ineligible to each lunch at school, it is still not proper for the board to suspend the pupil for such conduct.

In Marshall v. Board of Education of North Arlington, (1975) the Commissioner held that the board was not obligated to operate a summer school or to offer a program of summer employment. This is the case where the board was held to have the power to rescind a resolution previously

adopted, to offer summer employment to an individual.

In Minarcini v. Strongsville City School District, 384 F.Supp. 698 (N.D. Ohio, 1974) the school board's refusal to purchase three novels that were recommended by the school English department was held not to be arbitrary nor capricious and did not deny pupils the right to academic learning freedom and did not deny free speech, due process or equal protection.

A public school district is a creation of statute and has only such powers as are delegated to it by the legislature (Cook v. Griffin, 364 N.Y.Supp.2d, 632, NYAD, 1975, see also Dayton Classroom Teachers Association v. Dayton Board of Education, 323 N.E. 2d, 714, 41 Ohio State 2d 127, Ohio 1974, Connot v. Monroe, 227 N.W.2d 827, Neb. 1975). In this regard, as much control as possible should be left with the school board to set policy and manage the school (Hortonville Education Association v. Hortonville Joint School District No. 1, 225 N.W. 2d 658, Wis. 1975). The Hortonville case stands for the proposition of the impartial tribunal doctrine meaning that once a board of education has been determined to be in an adversary position, it cannot be regarded as a neutral party and, accordingly, any hearing pursuant to a teacher termination conducted by that board would constitute a violation of due process of law under the United States Constitution. In Hortonville, there had been an illegal teachers strike. The board of education

acted by issuing notice of proposed dismissal to each of the teachers involved and subsequently, pursuant to the request of the teachers, conducted a hearing and determined that each teacher should in fact be and was dismissed. The Wisconsin Court went on to say that the appropriate relief in such a situation would be a "de novo" hearing of all issues in any court of record in the county where the school district is located, such issues to be determined by the Court without a jury unless the judge determines to call a jury in an advisory capacity. The Hortonville case is now before the United States Supreme Court and if sustained, it would seem to remove the local board of education from local proceedings as to teacher terminations.

Generally, however, rules of a board of education have been held to be binding upon it (Ambrose v. Community School Board No. 30, 367 N.Y. Supp. 2d 550). Accordingly, a reasonable determination might be reached pursuant to an interpretation of the rules which set up local quasi-judicial proceedings before local boards of education.

On another subject, a typical problem faced by school boards is the closing of schools. It has been held that a local board in the exercise of its discretionary powers, may discontinue the use of a public school within the boundaries of its jurisdiction (Silverman v. Board of Education of Milburn Township, 339 A.2d 233,134 N.J. Supp. 253, 1975). Further, it has been held that a school board may sell and

lease both real and personal property, and that schools can require parents to provide supplies for their children (Beck v. Board of Education of Holland Consolidated School District No. 122, 325 N.E. 2d 640, Ill. Appell. 1975).

It is true that school authorities are vested with wide discretion in all matters affecting school management and a court may not ordinarily interfere unless such power is exercised in an arbitrary, unreasonable or unlawful manner (Saunders v. Reorganized School District No. 2 of Osage County, 520 S.W. 2d 29, Mo. 1975; see also Roane v. Callisburg ISD, 511 F.2d 633).

A board of education is a corporation created by statute with functions of a public nature expressly given and no others; as such it can exercise only such powers as are expressly conferred or fairly arise by necessary implication and only in the mode prescribed or authorized by statute (Evans v. Hutchinson, 214 S.E.2d 453, W.Va. 1975). In Tashjian v. North Colonie Central School District, 375 N.Y. Supp. 2d 467, NYAD 1975, it was held that a board of education had the unqualified duty to provide playground supervision.

The decision of a school board, however, would not be disturbed by the Courts unless the board has acted in bad faith, arbitrarily, capriciously or in abuse of its discretion or there is no substantial evidence to sustain its action (County School Board of Spotsylvania County v. McConnell,

212 S.E. 2d 264, Va. 1975). The "independent judgment rule" was cited in California School Employees Association v. Jefferson School District, 119 Ca. Reporter 668. It enunciates the principle of possible lack of specific authority, but taken alone it determines the reasonableness and justification of a particular district's discretionary judgment.

In Sapp v Renfro, 511 F.2d 172 (5th Cir. 1975), an action was brought challenging the constitutionality of the board of education requirement that all male students successfully complete the ROTC program during their tenth grade year of school as a prerequisite for graduation. The Court of Appeals held that the claim for declaratory relief was moot by reason of the plaintiff's graduation from another school in which he had enrolled as a tuition paying student after the District Court had denied temporary relief. Further, the Circuit Court held that an award of damages was barred by the qualified immunity enjoyed by school board members where there was no indication of malicious intention and where plaintiff's freedom from attending ROTC was not a clearly established constitutional right, despite claims based on personal belief alleged to be religious in nature, i.e., objection to being taught how to kill and freedom of expression.

5. OPEN MEETING LAWS

The leading case as to the interpretation of Open Meeting Laws came out of Oklahoma in 1975 (Oldham v. Drummond Board of Education of Independent School District No. 84, et al. 542 P.2d 1309 (Okl. 1975) the petitioner sought a declaratory judgment to declare the school board's action in not renewing his teaching contract a violation of the statute and therefore invalid. The District Court declared the school board's action to be invlaid and held petitioner had not been terminated as a teacher. Upon appeal the Supreme Court held that the failure of the school board to record the vote of each individual member within its minutes rendered its action invalid and further, that such failure of a school board to record its votes of its individual members was not harmless error.

A possible remedy was found in the case of Haight v. Board of Education, 329 N.E. 2d 442, Ill. App. 1975, wherein it was held that a school board may amend its minutes at any time to conform to what in fact occurred at a prior meeting.

It has been held that the policy of open meetings is particularly applicable to school boards (Greer v. Board of Education of Santa Rosa City School District, 121 Ca. Rep. 542). Courts have now delved into areas other than the mere fact of "leaving the doors open." Some states have no exception whatsoever relative to open meetings. Typically,

however, upon consideration of a school board's role in its quasi-judicial capacity, it has been determined that a school board may deliberate in private pursuant to the evidence heard in open session (Stillwater Savings & Loan Association v. Oklahoma Savings & Loan Board, et al., No. 46752, Jan. 1975).

In Santa Barbara School District v. Superior Court of Santa Barbara County, 530 P.2d 605 (Ca. 1975), the question of the posting of an agenda came into issue. The court held that under a statute requiring the governing body of a school district to post an agenda forty-eight hours prior to a meeting, such governing body cannot change its posted agenda within the forty-eight hour period immediately preceding the regular meeting. If such governing body wishes to change substantially its agenda within that period, it must postpone the meeting at least forty-eight hours and post an amended agenda. Further, the court indicated that newspaper publicity cannot replace the proper posting of an agenda of a school board meeting.

6. MISCELLANEOUS AREAS

In Lamont Independent School District No. 95 of Grant County, et al., v. Swanson, 47 OBAJ 764, a patron brought an action in District Court alleging personal injury caused by a school district's negligence in failing to properly protect him as a basketball player from a window hazard. There was no evidence as to whether or not the petitioner was a pupil of that school district. The school board primarily argued governmental immunity. The Oklahoma Supreme Court held that the securing of liability insurance is not an absolute waiver of governmental immunity, but is a waiver of governmental immunity to the extent of the insurance coverage only. In Grubbs v. White Settlement Independent School District, 390 F.Supp 895 (1975) a school teacher brought an action against a school district for alleged improper termination. The District Court held that the school district was immune from suit under the Civil Rights Statute, but that the Court had Federal question jurisdiction over the action. The Court found that the teacher had been accorded due process in her termination. In this particular case, it was held that a statement by an individual board member at a board meeting does not have the effect of committing the whole school board to a particular course of action or committing the school district to any kind of agreement.

It is becoming popular for school districts to be on

the affirmative side of a lawsuit by bringing an action themselves. This right is typically authorized by statute and has been specifically upheld (Wilson v. Strange, supra; Joint School District No. 1, City of Wisconsin v. Wisconsin Rapids Education Association, 234 N.W. 2d 289). Further, it was held in 1975 that school board members are in fact public officials who are bound to those standards regulating their conduct while in office required of other public officers (Wong v. New York State Board of Elections, 371 N.Y. Supp. 2d 227, 1975).

CHAPTER TWO

A. 1976 TEACHER TERMINATION PROCEDURES IN OKLAHOMA

Although much has been said previously concerning current procedures required as to proposed teacher terminations, it would be appropriate at this time to review the current status of Oklahoma law in this regard.

If a teacher is currently (school year 1975-76) in his fourth or more continuous year with the same school district, then that teacher has "tenure" and the provisions of Title 70, O.S., 1971, Section 6-122 (Section 106 of the Oklahoma School Code) are applicable. All other teachers would be considered as "non-tenured" and only the provisions of Title 70, O.S., Section 6-101(E) (Section 85(E) of the Oklahoma School Code) would be applicable. To non-renew a non-tenured teacher, all that is required under law is that written notice of non-renewal issue by registered or certified mail prior to the 10th day of April, 1976. Board action in either case, must reflect said non-renewal and the vote of each board member be recorded specifically within board minutes. In the case of a non-tenured teacher, neither statement of cause or a reconsideration hearing is required.

As to the tenured teacher, once again, notice of non-renewal must issue by registered or certified mail prior to April 10, 1976. The notice must include a statutory statement of cause, i.e., willful neglect of duty, incompetency,

etc. and further, a statement clearly indicating that the teacher is entitled to a reconsideration hearing upon that teacher's request. If the teacher does in fact request a reconsideration hearing, it must occur and the matter at the local level be finalized no later than the 10th day of May, 1976. In essence, if a request is received by the teacher, then the hearing must be set down to be conducted within 20 days after receipt of the request or no later than the 10th day of May, 1976. The hearing only constitutes a "reconsideration" of prior board final action previously determined.

After the hearing has been conducted and a decision reached, the teacher is permitted to appeal that action to the Professional Practices Commission. Appeal must be filed no later than June 30, 1976. After the Commission has conducted its hearing either party may appeal the Commission's decision to the State Board of Education within 30 days. Upon receiving such a request, the State Board will conduct another hearing. From the State Board's order, either party may appeal pursuant to a "Petition For Review" in the District Court of Oklahoma County, State of Oklahoma. This appeal constitutes a mere review of the proceedings conducted before the State Board of Education and no further hearings are conducted. The District Court decision is, of course, appealable to the State Supreme Court.

Pursuant to the three hearings involved in this proce-

dure, i. e., the local board hearing, the PPC hearing and the State Board hearing, the burden of proof at all times is on the school administration to prove the statutory cause asserted. Although the local board hearing must be held in open session, hearings before the PPC and the State Board may be held in executive session only if agreed upon by all parties concerned.

An order of reinstatement by the PPC or the State Board goes toward whatever the teacher's contract calls for. In other words, if the contract reflects duties as a building principal, then that teacher will be reinstated as a building principal. Whatever the contract dictates would also have a direct bearing upon the applicable evidence presented to support an action of non-renewal.

Obviously, before any proceeding commences relative to non-reemployment, an attempt to obtain a voluntary resignation should be mandatory. If a resignation is obtained, it must be in writing and, pursuant to a ruling of the State Board of Education, must be submitted to the school administration or board of education by registered or certified mail. Upon receipt, the board must approve the resignation by a vote of board action at a regular or special meeting and once again, the vote of each board member accordingly recorded within board minutes.

B. SPECIFIC TEACHER LITIGATION

Title 17, §442 of the Louisiana Statutes Annotated, provides in part as follows:

> "Each teacher shall serve a probationary term of 3 years to be reckoned from date of his first appointment in the parish or city in which the teacher is serving his probation. During the probationary term the parish or city school board, as the case may be, may dismiss or discharge any probationary teacher upon the written recommendation of the parish or city superintendent of schools as the case may be, accompanied by valid reasons therefor."

I was unable to find a legal definition of "reckoned" but Webster provides assistance in defining this term as "to count, to calculate, to estimate, to value." This particular provision of §442 was at issue in the case of Kelly v. West Baton Rouge Parish School Board, 317 F.2d 194 (5th Cir. 1975). Because Louisiana's probationary statute is similar to Oklahoma's, I thought it might be of interest to learn that in this case, the court held that, under circumstances not constituting a "deprivation of liberty," there is no constitutional right to a hearing as to the discharge of nontenured teachers, who have no property interest in continued employment. The court emphasized, however, that there must be a "valid reason." In this case the reason was a reduction in teaching positions because of an enrollment decline. The Court went one step further and held that the

mere fact that nonretention by a school system might make a teacher less attractive to other school systems does not within itself constitute a deprivation of liberty, so as to entitle the teacher to a pretermination hearing. Since there was no stigma, there could be no deprivation of liberty. The court did hold, however, that teachers displaced as a result of desegregation were entitled to preference in re-appointment. If former teachers are minimally qualified for the jobs, they are entitled to receive them.

The Secretary of Defense, the Honorable James R. Schlessinger, was sued by a teacher in the case of Ring v. Schlessinger, et al., 502 F.2d 479 (Dist. of Columbia Ct. of Appeals, 1974). In this case, the teacher was hired to teach Navy dependents at the United States Naval Station on Midway Island for a one year probationary period. The teacher had made statements critical of the school principal, but indicated that such statements were only disseminated to persons concerned and/or connected with the school. Accordingly, she raised the issue of a violation of the First Amendment guarantee of freedom of expression. The statute, here, of course, was a Navy regulation, which specified certain procedural rights as to termination. In its opinion, the Court refers to Midway Island as a "remote island" and I can assure you that a truer statement was never spoken. The Court cited the landmark case of Pickering v. Board of Education, a United States Supreme Court case. The issue

in Pickering was whether a public school teacher could be dismissed for writing and publishing in a newspaper a letter criticizing the board of education's allocation of school funds between educational and athletic programs. The High Court balanced the teacher's interest as a citizen in commenting publicly on important issues, against the state's interest in promoting the efficiency of its employees public service, and held that the teacher's freedom of speech rights had been violated. It was pointed out, however, in Pickering, that the statements of the teacher, which were substantially correct, regarded matters of public concern and presented no questions of faculty discipline or harmony, and hence, these statements afforded no proper basis for the board's action in dismissing the teacher. The Ring case, as it was remanded, the record being insufficient to permit a resolution of the issues as raised, held that criticism by an employee is permissable when such criticism concerns itself with matters of public concern, as opposed to personality clashes, and should be statements of truth; but even if false, so long as they are matters of public concern, then per se, they are entitled to the protection of the United States Constitution.

In Roane v. Callisberg Independent School District, 511 F.2d 633 (5th Cir. 1975), a former superintendent of a school district brought an action against his school board challenging his discharge. The primary issue here involved

that of attorney's fees and whether or not the superintendent, who instituted a successful Civil Rights action was entitled to attorney's fees, he suing only in his own behalf and not benefitting any other person or class. Attorney fees are never automatically justified as an award. The award had been made in the Lower Court, but the 5th Circuit reversed saying that such an award was improper because it was not shown that the opposition acted in bad faith or that the result benefitted others, as well as the complaining party.

In Burton v. Cascades School District Union High School No. 5, et al., 512 F.2d 850, (9th Cir. 1975), a nontenured teacher was dismissed because she was a practicing homosexual and accordingly brought a civil rights action charging that her dismissal was a violation of her constitutional rights. She sought both damages and reinstatement. The District Court awarded the teacher damages and attorney fees, but denied her request for reinstatement. The Circuit Court upheld the District Court. The Court held that a nontenured teacher did not have a right to reemployment, even though she sustained her right to damages. The damage claim was sustained because the termination statute at issue was unconstitutionally vague. The court carefully sidestepped the issue of whether or not a school district is entitled to terminate or refuse employment as to an admitted homosexual. The school district had classified the teacher's condition as immoral, however. The statute in

this case was interesting in that it required that if upon reconsideration the school board did not determine to renew the contract, the material reason therefor shall, at the request of the teacher, be "spread" upon the records of the school district. The problem here is obvious.

Finally, in August of 1975, the Nebraska Supreme Court made a ruling in a maternity leave case which is signigicant. In Richards v. Omaha Public Schools, the Nebraska Supreme Court upheld a school district maternity leave policy which required classroom teachers to begin maternity leaves of absence at the beginning of a semester or a school year. The case was brought by a pregnant employee who had requested that she be permitted to teach a home economics course through the first two months of the semester and then commence a maternity leave of absence. She was placed on leave of absence commencing with the beginning of the semester and permitted to return to the classroom at the beginning of the second semester. The Court held as follows, relying upon Cleveland Board of Education v. LaFleur:

> "Continuity of instruction means more than having a qualified person available to substitute on a temporary basis for the regular teacher. The planning for a course of instruction is usually on a yearly basis and weekly lesson plans are designed to fit into the long range plan. It is also desirable that a continuous appraisal be made of the progress and achievement of the students. In order to carry out the policy of continuous instruction the respondent's attempt to avoid personnel changes during the year."

The Court further denied sick leave benefits relying upon the United States Supreme Court's decision in Geduldig v. Aiello, noting that a classiiication based on pregnancy is not a classificaiton based on sex.

Cases currently docketed before the United States Supreme Court relative to teacher litigation include Drew Municipal Separate School District v. Andrews, in which the issue is whether a school district rule, neutral as to sex and race, which excludes parents of illegitimate children from consideration for employment as teachers or teacher's aids, violate the Fourteenth Amendment due process and equal protection clause. Secondly, Keckeisen v. ISD 612 wherein the issue is whether a public school board regulation that prohibits marriage between a high school principal and a physical education teacher is permissable under the Constitution.

C. REASSIGNMENT AND REDUCTION OF SALARY

There is no question that a certificated employee can be reassigned to another posision within his area of certification. The only exception to this rule would be that if the employee had a contract for a certain position, then he would be entitled to remain in that position for the period of the contract.

If any portion of a certificated employee's contract is to be changed for the following fiscal year, then the provision of Title 70, O.S., 1971, Section 6-101(E) comes into play. It states:

> "A board of education shall have authority to enter into written contracts with teachers for the ensuing fiscal year prior to the beginning of such year. If, prior to April 10, a board of education has not entered into a written contract with a regularly employed teacher or notified him in writing by registered or certified mail that he does not desire to be re-employed in such school district for the ensuing year, such teacher shall be considered as employed on a continuing contract basis and on the same salary schedule used for other teachers in the school district for the ensuing fiscal year, and such employment and continuing contract shall be binding on the teacher and on the school district." (emphasis added)

It is generally thought that the "April 10th" date applies only to the prospect of termination, i.e., nonrenewal; however, it also would apply to changes in the contract pursuant to the language, "such teacher shall be considered as employed on a continuing contract basis and on the same salary

schedule used for other teachers in the school district for the ensuing fiscal year. . . ."

The typical case of "reduction" would be the administrator who is relieved of administrative duties and reassigned full-time to the classroom. A recent District Court decision in Oklahoma has told us that an administrator cannot be so reassigned, nor his salary reduced, during the course of a contract year, except upon just cause.

Because administrators attain continuing contract status as well as tenure pursuant to their status as a "teacher", then they are only entitled to be renewed as a teacher. Accordingly, an administrator can be reassigned and his salary accordingly reduced, if he is notified of same prior to April 10th as to the ensuing fiscal year.

Obviously, a salary breakdown within the contract should always delineate those monies payable as to the administrator's teacher status and those monies payable for additional assignments, such as administrative duties.

The "vo-ag" instructor, who has a twelve month appointment and receives additional monies payable from the vocational technical department in Stillwater, would not be entitled to such monies unless he is actually filling the position so designated to receive those monies.

There is no requirement to contract with an administrator, only with a teacher. The same premise would apply to coaches, band directors and other such positions other than that of a classroom teacher.

D. "THE INTERRUPTION OF TENURE AND SOME CONTRACTUAL NOTES ON ADMINISTRATIVE TENURE"

Consider the following. A teacher is in his second year of employment with a school district and requests a six month leave of absence. Does that six month period count for purposes of attainment of three completed and continuous years with a school district for purposes of tenure? Working under the theory that the three year period is observation time of a teacher's performance and if the teacher is not on the job, then observation cannot occur, than that six months would not count towards the three year requirement.

Consider the same teacher, however, who has previously attained tenure and requests and receives a six month leave of absence. Does that teacher lose tenure? The answer here is no, because even though on a leave of absence, a teacher remains under contract and there is no "broken service." If a tenured teacher resigns or leaves the school system, thereby terminating any existing contract and returns one year later, then under law, there is no tenure. The same situation occurs when a teacher leaves one school district and goes to another. Tenure is not transferrable and further, the receiving district cannot automatically award tenure because once again, the law requires three years. If the teacher resigns at the end of one year and changes his mind and returns to the system without any lapse of working per-

formance time, then tenure would continue.

In speaking of a contract, one cannot overemphasize the importance of what the contract calls for. An example would be that both the State Board of Education and a recent District Court decision have indicated that if a teacher or administrator contracts for specific duties at a specific stipend, then that cannot be changed during the course of the contract year, except upon "just cause." If there is to be a change in the contract for the next year, then notice as to that change must be provided prior to April 10 or the contract will be renewed at the same salary rate and with the same provisions therein. Although an administrator cannot attain tenure as an administrator, being only permitted to attain tenure as a teacher, an administrator does have a contractual right if assignment as an administrator is specifically included within the contract. Accordingly that administrator cannot be reassigned to a classroom during the course of the contract year, except upon "just cause". Additionally, if any conditions of employment are to be included therein, the same would apply to a change in the contract and notice must be provided prior to April 10 as to the next contract year. New conditions of employment cannot be included in a contract if the contract is currently in operation for that current year.

Additional questions as to leaves of absence include, does a school district continue to pay benefits if the

teacher is on a leave of absence? The first consideration would be if the teacher is on a paid leave of absence. The second consideration would be as to who actually pays for the benefit. This may be the case where the teacher's salary is deducted to pay the benefit, or the school pays the benefit, or both contribute to the benefit. If the teacher is not being paid while on a leave of absence, then obviously no payment would accrue from his salary. If the school district pays the total benefit, however, with no contribution from the teacher and the teacher is on a leave of absence and still under contract, then the benefit would continue. This area obviously must be determined by regulation and notice provided to all employees. Obviously, a teacher may choose not to take a leave of absence if at the same time that teacher will lose benefits, e.g., medical coverage. In the alternative, since the teacher has been put on notice, the teacher could provide an alternative for coverage for the period of the leave of absence.

When a teacher terminates his contract, then all benefits end. None of those benefits are transferrable to any other school district. Additionally, if the teacher returns to the school district after "broken service," those benefits previously accrued would not be awarded, having been terminated at the time of termination of the contract.

E. ARE TEACHER CONTRACTS PUBLIC RECORDS?

On the 15th day of March, 1976, the Attorney General issued Opinion No. 76-118 which held:

> "Teacher contracts, employee payroll claims, or any other public record reflecting the exact salaries of public school teachers and other public employees, are subject to the provisions of 51 O.S., 1971, Section 24 and therefore are required to be kept open for public inspection."

Title 51, O.S., 1971, Section 24 provides as follows:

> "It is hereby made the duty of every public official of the State of Oklahoma and of its subdivisions, who are required by law to keep public records pertaining to their said offices, to keep the same open for public inspection for proper manner, to the citizens and taxpayers of this State, and its subdivisions, during all business hours of the day; provided, however, the provisions of this Act shall not apply to income tax returns filed with the Oklahoma Tax Commission, or other records required by law to be kept secret."

It is obvious that any public expenditure by a governing body would be subject to public inspection and review. It is questionable however, as to the public record aspect of an employment contract between the school district and the school district employee. Section 201 of Title 25 (Oklahoma's Open Meeting Law) provides as follows:

> "Executive sessions will be permitted only for the purpose of discussing the employment hiring appointment, promotion, demotion, disciplining or resignation of any public officer or employee;"

Discussions as to employment may well be documented in the contract itself. The Attorney General in Opinion No. 76-118 apparently relied upon the provisions of Title 70 O.S., 1971, Section 6-101 which provides in part as follows:

> "One copy of the contract shall be filed with the Clerk of the Board of Education and one copy shall be retained by the teacher, and if the contract is with a dependent school district one copy shall be filed with the County Superintendent of Schools."

The Attorney General went on to say that "under this statute it is obvious that individual teacher contracts are a matter of public record and must be treated accordingly." This author is not sure that it's "obvious" because the teacher's contract is a document contained in the teacher's personnel file, a file which is not open for public inspection or review. Simply because a copy of the contract is filed with the clerk of the board of education would not necessarily mean that the contract would be open to public inspection.

Public expenditures including employee salaries would be documented in board minutes (which is a public record) at such time as the board of education approves public claims.

Therefore, excluding information as to expenditure of salaries, an employment agreement should not necessarily be considered a "public record" except when agreed to by the parties.

Speaking of Oklahoma's Open Meeting Law, the Attorney

General has now indicated a third exception to Section 201 of Title 25.

The first two exceptions would include the provision cited heretofore relating to the "discussion of personnel." The second exception is based upon the State Supreme Court's holding in Stillwater Savings & Loan Association v. Oklahoma Savings & Loan Board, 534 P.2d 9 (Okla. 1975) and Attorney General Opinion No. 75-197 (August 29, 1975) wherein it was held that the Open Meeting Law does not include hearings held by a public agency when said agency is acting in a quasi-judicial manner. This opinion applies in the area of student and teacher hearings, although the hearings themselves must be conducted in open session. When the board has heard the evidence and intends to deliberate upon the evidence, then it can go into executive session, but of course, any official action taken thereafter must be made in open session.

By virtue of Attorney General Opinion No. 75-311 dated January 9, 1976, the Attorney General has added a third exception, a governing body may meet in executive session to privately confer with its lawyer concerning litigation pending or impending without violating the provisions of Section 201.

CHAPTER THREE

SCHOOL LAW DECISIONS IN THE OKLAHOMA SUPREME COURT

The first major State Supreme Court decision in Oklahoma concerning a public school issue was the landmark case of Morrison, et al. v. Roberts, 82 P.2d 1023 (Okla. 1938). This case was of national significance because it was the first case involving a challenge to a State Athletic Association. This kind of case has become very prominent in recent years, but Morrison was the first and as is typical of most of these cases, other than those dealing with sex discrimination, the athletic association was successful in having the Court sustain its decision to render a student athlete ineligible.

Since 1938 there have been few school cases within the State of Oklahoma. In 1943 and 1944 there were two significant teacher litigation cases in Oklahoma. The case of Consolidated School District No. 4, Bryan County v. Millis, 192 Okla. 687, 139 P.2d 183 (1943) was one of an alleged wrongful and unlawful discharge. The Ray v. Board of Education of Pond Creek, Grant County, 194 Okla. 472, 153 P.2d 233 (1944) case involved a teacher's attempt to claim monies pursuant to performance rendered under a written teaching contract. The Ray case stood for the following proposition:

> "A cause of action predicated on the wrongful breach of a contract to teacher in the public schools is limited in the amount of recovery to the sum appropriated for payment of the contract."

The Millis case stood for the following propositions:

1. "A contract between a school district and teacher may provide for grounds for dismissal in addition to those statutory grounds."

2. "In absence of a statutory restriction upon a board of education to transfer a teacher from one class or grade to another, the Board has discretionary power to assign, reassign and transfer its teachers."

3. "The rules of law relating to performance and breach of contracts generally apply to contracts between teachers and school authorities."

This article will not deal in depth with cases involving the transfer of students, but here follow some citations to those cases which are significant in the area, noting however, that the transfer laws have been continuously changed, repealed and amended throughout the years and only the most recent cases would be of significant value. See In The Matter of Transfers of Students From Caney Valley Independent School District No. I-18 To School District No. I-14, 44 O.B.J. O.B.A.J. 40 (Jan. 9, 1973); Board of Education of Okay Independent School District No. 1, Wagoner County v. Carroll, 512 P.2d 872 (1973); Board of Education of Independent School District No. 1 of Tulsa County v. Clendinning, 431 P.2d 382 (1967); Board of Education of Independent School District No. 48 v. Rives, 531 P.2d 335 (1975); Board of Education of Dependent School District No. 32 v. Oklahoma State Board of Education, 521 P.2d 390 (1974) and Independent School District

No. 4 v. State Board of Education, 451 P.2d 684 (1969).

In Lovelace v. Ingraham, 518 P.2d 1102 (1973), the teacher, Lovelace, succeeded in pursuing a request for reinstatement within the school system by virtue of a challenge to the "statement of causes" which was contained within her "notice of nonrenewal." The teacher was tenured and pursuant to Title 70, Oklahoma Statutes, 1971, Section 6-122, (Oklahoma's Teacher Tenure Law) (see French, "An Analysis of Oklahoma's New Teacher Tenure Act") 43 O.B.A.J. 1431 (May 27, 1972) and French, "Oklahoma's Teacher Tenure Law: Revisited" 45 O.B.A.J. (Feb. 23, 1974), a tenured teacher is entitled to written notice by certified or registered mail which must contain a statement of cause applicable to his nonrenewal. In the Lovelace case, within the written notice of nonrenewal, a statement was made that the school board's decision was reached principally on the basis of the following reasons:

1. System of grading;
2. Partial to certain students;
3. Complaints of some parents on method of teaching.

The Supreme Court held that such statements were not sufficient to constitute a "statement of cause" and held that any such notice shall not be effective unless the statement of cause reflects specifically a statutorily created ground for nonrenewal, i.e., cruelty, willful neglect of duty, in-

competency, immorality, disloyalty to the American constitutional system of government or acts of moral turpitude.

There have been three significant Court of Appeals decisions rendered in recent years. On July 31, 1973, in Millhouse v. Langston Board of Education, the Court held that a board of education cannot decrease a teacher's salary unless the reduction is negotiated prior to the April 10th deadline pursuant to the provisions of Title 70, O.S., Section 6-101(E). The Court further held that a teacher's salary could not be reduced under any circumstances unless there was also a reduction of duties.

On February 18, 1975, Miller v. Temple Independent School District No. 101 was handed down, (see 46 O.B.A.J. 372) wherein the Court held that if a procedural due process question is involved in a teacher termination case, then the District Court should consider the question; but when the issue pertains only to the question of cause, then it is within the sole jurisdiction of the State Board of Education. This case has been partially overruled by Martin v. Harrah Independent School District, 46 O.B.A.J. 2146 (Nov. 1975) which will be discussed later.

In Sanders v. Independent School District No. I-2, No. 47212 (May 6, 1975), the Court defined the terminology "a regularly employed teacher" by saying that it would have to be one who is available and teaching regularly and who is being paid regularly as a teacher. The Court went on to say

that if one was not a regularly employed teacher, that teacher would not be entitled to the benefits of the automatic contract renewal provisions of Section 6-101(E). This case seems to represent the only Oklahoma law in regard to so-called "part-time" teachers.

A very significant State Supreme Court decision was handed down in 1974, Adams v. Professional Practices Commission, 524 P.2d 932 (Okla. 1974). This decision held that the Professional Practices Commission was in fact a State Agency and accordingly must come into compliance with the provisions of the Oklahoma Administrative Procedures Act, i.e., Title 73, O.S., 1971, Sections 301 et seq.

In 1975 two more State Supreme Court decisions were handed down. The first was Oldham v. Drummond Board of Education, 46 O.B.A.J. 2091 (Oct. 28, 1975), in which the Court held that pursuant to board action, the vote of each board member must be recorded within the minutes in order for such action to be valid. In this particular case, the board of education in question had voted not to renew a teacher's contract. Pursuant to the actual vote taken publicly in open meeting, four board members voted to nonrenew and one board member abstained. Board minutes subsequently approved by the board of education reflected "motion carried." The Court held that the provisions of Title 25, Oklahoma Statutes, 1971, Section 201 (Oklahoma's Open Meeting Law) clearly require that the vote of each board member be cast publicly in open

meeting, the reasoning being that a taxpayer has a right to know how his particular elected official votes as to each board matter.

And finally, in what represents the most significant school case since Morrison, the State Supreme Court in Martin v. Harrah Independent School District, 46 O.B.A.J. 2146 (Nov. 1975) held that administrative remedies must be exhausted before recourse is made to the Courts in a teacher termination matter. In this particular case, the teacher, who was tenured, was not renewed because she had failed to comply with the board's rule concerning continuing education. The teacher challenged this action by filing an appeal with the administrative Professional Practices Commission and concurrently filing an Application for Writ of Mandamus with the District Court of Oklahoma County asking for immediate reinstatement. The teacher also filed a separate action in Oklahoma County seeking civil damages. An additional issue involved was whether or not the teacher had the right to be reinstated to her coaching duties.

The Professional Practices Commission conducted a hearing and held in favor of the Board of Education sustaining the rule of continuing education. The District Court, however, determined that the teacher's due process rights had been violated and reinstated the teacher with all rights and benefits. As to the additional issue of the coaching duties, the District Court subsequently held that the teacher was

not entitled to reinstatement as a coach, but only to teaching duties and the related salary. All parties agreed to stay the damage suit until the other issues were resolved. The teacher did not appeal the Professional Practices Commission decision to the State Board of Education pursuant to the provisions of Title 70, O.S., 1971, Section 6-122.

The District Court decision, both as to reinstatement and refusal to reinstate as a coach, was appealed and first was assigned to the Court of Appeals. The Court of Appeals upheld the District Court's issuance of a Writ of Mandamus, but never determined the coaching issue. Upon a Petition for Writ of Certiorari, the Oklahoma State Supreme Court reversed both the District Court and the Court of Appeals and, in addition, rendered the coaching question moot. Obviously, the failure of the petitioner to pursue her administrative remedies by exercising her appellate right to the State Board of Education was fatal in this particular case. This case apparently stands for the proposition that in regard to teaching matters relative to tenured teachers, the provisions of Section 6-122 will take precedence over all other matters and before a teacher can challenge board action upon any ground, whether it be substantive or procedural, he must first pursue his administrative remedies pursuant to Section 6-122.

CHAPTER FOUR

TWO RECENT SCHOOL LAW DECISIONS EMPHASIZE IMPORTANCE OF RULE-MAKING AUTHORITY

Within recent weeks, two important school law decisions have been handed down, one from the Supreme Court of the State of Oklahoma and the other from the United States District Court for the Western District of Oklahoma.

The first case, Independent School District No. [redacted] of Seiling v. The Honorable J. Russell Swanson, et al., No. 48,253 (June 1, 1976) represents the first hair length controversy to reach the Oklahoma State Supreme Court. In the past, "hair" cases have ordinarily been lodged within the Federal Court System, and all of them have been dismissed for lack of a federal question.

The Oklahoma Supreme Court held the following:

1. The scope of a school board's rule authority regarding the physical appearance of students is limited to the adoption of rules that have a reasonable connection with the educational function entrusted to the board by the public.

2. While the right of a student to be present in school is not absolute, any rule which would exclude him must exist for a reasonable and necessary purpose.

3. While the intention of the hair length provisions of a public school dress code is to control hair length during school hours, its necessary effect is to control hair length for twenty-four hours a

day and out-of-school activity is regulated more than is in-school activity.

4. A school board rule imposing a significant invasion into the private lives of children and their parents requires a showing of greater justification and demonstrable need by the school board than one regulating purely in-school behavior.

5. Absent a clear showing a a reasonable connection between a dress code adopted by a school board and proper educational functions, the adoption of such a rule is violative of statutory authority granted school boards to adopt rules governing student behavior.

The code in question required boys to wear their hair "above the eyebrows, collars and ears" and further, required them to have their hair well groomed at all times and to wear their sideburns no longer than the bottom of the ear lobe.

Based on number "3" above, this case would appear to terminate future "hair length" controversies. This is not to say, however, that a school district cannot promulgate and enforce a reasonable dress code. It does seem to say, however, that the length of hair, absent a cleanliness issue, is not subject to regulation because it would be an impermissable attempt to control behavior outside of regular school hours.

This opinion emphasizes the fact that any rule or regulation that a school board promulgates must have some reasonable justification. Typically, school boards are granted wide discretion in regulating behavior during regular school

hours.

This opinion emphasizes the fact that any rule or regulation that a school board promulgates must have some reasonable justification. Typically, school boards are granted wide discretion in regulating behavior during regular school hours. This discretion, however, is subject to abuse, as indicated by the Supreme Court. The rule making power of an Oklahoma school district is a precious covenant and should be protected by the utilization of procedures through which the board takes into consideration the opinions and mores of the community which they serve.

The second decision involved a tenured teacher termination and as a side note, this case, Martin v. Harrah Independent School District, et al., No. CIV 76-0045T (May 25, 1976) has been litigated in almost every tribunal available. As a background, the case was initially heard before the local school board and thereafter by the Professional Practices Commission, both of which held in favor of the school district. Concurrently, a petition was filed in the District Court of Oklahoma County in which the trial court held in favor of the teacher. This decision was appealed to the Oklahoma Court of Appeals which upheld the Trial Court. Upon the Petition For Certiorari to the State Supreme Court, that Court reversed both the Court of Appeals and the Trial Court, holding in favor of the school district. Subsequently, a new action was filed in Federal Court and upon proper

hearing, the Court held in favor of the school district. This case may well be appealed to the Federal Tenth Circuit Court of Appeals in Denver with the ultimate possibility of reaching the United States Supreme Court.

The case initially involved a violation of the rule of "continuing education." There was an additional issue involving due process, and in that regard, the Court stated:

> "Notice in the due process sense seems to intend notice of the proceedings against the plaintiff, not notice of all possible penalties that may be imposed for a violation of certain rules and regulations. . . The Court is satisfied that plaintiff received all notice constitutionally required."

The initial provision relative to the rule of continuing education did not provide for payment of additional salary increments. Since the Legislature had recently mandated such increments, the school board notified the teacher that she would face termination if she did not comply with the Rule There was never a question that a violation existed, and the teacher was eventually not renewed.

The Court specifically held that the school district had fully complied with Oklahoma's Teacher Tenure Law (70 O.S. §6-122) and further, that a provision requiring continuing education for teachers is without question a requirement that has a rational relationship to the objectives of the school district, i.e., the goal of increasing the competence of the faculty entrusted with the instruction of the children in the

school system. The Court further stated:

> "This Court readily recognizes that public school officials have the undoubted authority to adopt reasonable employee qualification criteria. . . ."

This decision as well as the Seiling case again emphasizes the critical importance of the "rule-making" process. Even though school districts in Oklahoma are not subject to the Administrative Procedures Act as are state agencies, the act represents an important guideline which should be followed to insure that courts continue to give to school districts wide discretion in regard to their rule making power. The Act provides as follows:

Each agency shall:

1. adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests;

2. adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

3. make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;

4. make available for public inspection all final orders, decisions and opinions.

Prior to the adoption, amendment, or repeal of any rule, the agency shall:

1. give at least twenty (20) days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their views thereon. The notice shall be mailed to all persons who have made timely request of the agency for advance notice of its rule-making proceedings and shall be published in the Oklahoma Gazette, or its successor publication;

2. afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. In case of substantive rules, opportunity for oral hearing must be granted if requested in writing by at least twenty-five (25) persons, by a governmental subdivision or agency, or by an association having not less than twenty-five (25) members. The agency shall consider fully all written and oral submissions respecting the proposed rule.

3. If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than twenty (20) days' notice and states in writing its reasons for that finding, it may proceed without prior notice of hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period of not longer than one hundred twenty (120) days, but the adoption of an identical rule under the procedure set by subsection (a) is not precluded. The sufficiency of the reasons for a finding of imminent peril to the public health, safety or welfare shall be subject to judicial review.

An interest person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. The agency shall act upon said petition within a reasonable time.

CHAPTER FIVE

A. THE EMPLOYMENT RIGHTS OF PRINCIPALS

Statutorily speaking, there is not one group of professional educators with the possible exception of librarians and counsellors that the law neglects more than the school principal and, particularly the secondary school principal.

In the fall of 1973, this attorney wrote an article which was published in the Oklahoma State School Boards Journal entitled "The Statutory Status of the Public School Principal." In that article I referred to the statutory definition of a principal (Title 70, O.S., §1-1163):

> "A principal shall be any person other than a district superintendent of schools having supervisory or administrative authority over any school or school building having two or more teachers. . . ."

According to a 1970 survey conducted by the National Association of Secondary School Principals, the State of Oklahoma was included within category (C) along with seventeen other states which found that those applicable state codes occasionally mentioned the principal with regard to specific duties and responsibilities. Obviously, in Oklahoma the principal's duties and responsibilities are not so statutorily defined nor enacted. The Oklahoma Association of Secondary School Principals has drafted legislation in this regard, but the bill failed to proceed via the normal legislative process.

Additionally, other pieces of legislation, i.e., legislation in regard to permitting principals to organize as a separate bargaining unit, pursuant to Oklahoma's Professional Negotiations Act and legislation to permit school districts to contract with all administrators for a three year period, have met defeat as well.

In an article prepared especially for the Oklahoma Association of School Administrators Summer Conference in June 1974, the following question was raised, "Is An Oklahoma Administrator Qualified to Attain Tenure Pursuant to Section 6-122?" Section 6-122 is Oklahoma's Teacher Tenure Law. We continue to have no definitive answer to this question, although we continue to assume that because a principal is first and foremost defined pursuant to Section 1-116(3) as a teacher, and secondly, because Section 6-122 refers to "any teacher," then a principal and/or administrator only attains tenure as a teacher. We have had, however, some recent administrative decisions from the State Board of Education which question this premise.

In a case decided last year, in regard to the question of reinstatement, the State Board held that a certified employee would be reinstated to whatever the contract calls for. In other words, if you, as a principal, have in your contract that specific assignment as a principal and you are not notified as to any change prior to April 10th, then your administrator's contract has been renewed for the next year and you

are entitled to return as a principal or at the minimum be assigned to an administrative position, as opposed to duties in the classroom.

In this regard, many of you may recall the recent case in Muskogee in which a principal was returned to his school as a principal by the District Court. This case was somewhat distinguishable, however because the school system in Muskogee attempted to relieve the principal from his administrative duties during the course of the contract year. His contract designated duties as a principal and accorindgly he could not be removed during the course of the contract year, except upon just cause. As to the ensuing year, the board could notify him prior to April 10th that he has been relieved of his administrative assignment of duties forthe ensuing year and reduce his salary accordingly. The April 10th date, although generally thought of as pertaining only to terminations, pertains specifically to the question of contract. Any change as to a certified employee's contract for the ensuing fiscal year must be made by notice to the employee prior to April 10th.

Another interesting point which one could use to argue that an administrator can attain tenure as an administrator is based upon the premise that if a school district has within its employ a full-time administrator and desires to terminate that administrator as opposed to reassignment or reduction to the classroom, then what evidence is applicable to justify and substantiate that termination? Obviously, if the man or woman

has been a full-time principal evidence relative to his teaching competency and/or duties would not be relevant, not would there be any, because the person had not been doing that job. The only evidence available would be that evidence pertaining to administrative performance. Upon presentation of this evidence you would continue to be devoid of evidence relative to a teaching position and the Professional Practices Commission and the State Board of Education could reinstate that principal as a teacher in your school system. Accordingly then, an argument could be made that if you are employed as an administrator and have, in effect, an administrator's contract, then you are reinstatable as an administrator pursuant to the State Board of Education opinion of last year. It would logically follow that if the school district could support a termination case as to administrative performance, then the principal should not be permitted to be reinstated as a teacher. The situation becomes even more complicated, however, when one considers the position of teaching principal and that's another whole presentation to be made at another time.

A recent problem has come upon the horizon and although it may well be unique to certain school systems it is worth serious consideration. What happens when a school is closed thereby making available administrators as well as a number of teachers and the school system must find some "slots" elsewhere or terminate personnel. Loss of attendance is a valid ground for termination of a teacher as it is for an administra-

tor, even an administrator with a great deal of seniority in the system. If we further assume that the school system prefers to retain that particular administrator then the question would be whether there is a duty and/or responsibility for the school system to create an administrative position for that administrator pending the opening of an administrative vacancy in another school. A further inquiry would be as to whether that administrator, who might, for example, have twenty years time in service, would have some type of preference of assignment over a principal at another school which is not being closed, who has only one or two years time of service. In other words, in addition to the continued rights of employment of a certificated employee, you are adding a new dimension here in respect to perhaps a "seniority" or "preference" status relative to an administrative assignment based upon time in service in a totally separate classification than the classroom teacher.

Obviously, these problems could be solved legislatively or by negotiation.

B. THE ELEMENTARY PRINCIPAL AND THE LAW

The following are some of the issues which are elementary principal must face:

1. Corporal punishment
2. Student due process
3. Teacher complaints and evaluations
4. The managerial aspect of the elementary principal, including the "Teacher-Principal" relationship and the matter of professional negotiations
5. Tort liability which would include both individual and medical liability.

A tort is a civil wrong committed against another person; for many years this country has recognized that when you negligently injure someone you have an obligation to indemnify the injured party. In this regard school personnel have been subject to tort suits throughout the history of public education. This area of the law involves three inquiries:

1. Does one own a duty of care to another?;
2. Did one fail to exercise that duty of care?;
3. Was the failure to exercise the duty of care the proximate cause of the injury?;

What exactly would be a "standard of care?" It is generally defined as that care a reasonably prudent person would exercise under the same or similar circumstances. Within the area of school tort law, most litigation is classified by subjects--such as physical defects and instruction and supervision. School officials possess a certain degree of governmental immunity in this kind of lawsuit. It does not however, protect one who

has been determined to have been negligent. In a typical tort lawsuit we might find that the plaintiff has filed a complaint against the board of education, the superintendent, the principal and the teacher. The board will generally rely upon governmental immunity and be dismissed from the lawsuit. The superintendent will probably do the same, and the burden then falls upon the principal and the classroom teacher as they are more directly related to, for example, playground supervision. If the principal has properly scheduled playground supervision and has taken reasonable steps to assure that such supervision is actually performed, then the teacher who is alleged to have left her children unsupervised bears the burden of the defense. But take for another example, a physical defect upon school grounds. A simple hole in the ground has developed over a period of time and has gone unnoticed by the school building principal or, more likely, the grounds supervisor. Possibly, even the superintendent and board of education would be involved here to some extent since they might be responsible for assuring that buildings and properties are reasonably safe for the occupation of youngsters. These are the types of basic daily controversies in which you as an elementary principal can become involved. I am sure that all of you are adequately insured professionally. You must remember, that a school district cannot pay your legal expenses when you are sued for individual negligence. Accordingly, be sure that when you receive a summons, you contact

your insurance company and receive the services for which you have been paying premiums. School district laywers can only represent you, the elementary principal, in your capacity as as school official. When it has been alleged that you have acted negligent, then you, in effect, lose the immunity granted to the school official and must stand alone as the object of the litigation. Facts that would be considered in your defense would be contributory negligence, i.e., the person who is hurt contributed as much to the incident as anyone else's negligence did, or the principle of intervening cause, i.e., where some outside unknowing cause beyond your control intervenes to cause the accident.

Concerning individual liability, the Supreme Court case of Wood v. Strickland has told us that school officials, including both board members and administrators, can be held individually liable under certain circumstances when it is proven that the official has acted willfully, maliciously and/or without due regard of one's constitutional rights. In summing up the tort liability situation then, we must remember that school personnel are responsible for providing proper instruction, as well as supervision, in order that accidents and injuries can be avoided.

In 1975, the United States Supreme Court also handed down the case of Goss v. Lopez, which involved student procedural due process. The Court said that before a student could be suspended for any length of time, that student must first be

afforded notice of the charge against him and given an opportunity to respond to that charge. This particular procedure has been referred to as an "informal evidentiary hearing" conducted at the local school building level as soon as possible after the incident has occurred. It is not necessary that a lawyer be present, but the student's parents or guardians should be. The hearing shall be before an appointed school official, generally, the building principal or his designated representative. Of course, under Oklahoma's student suspension statute, each student who has been suspended for any length of time is entitled to an eventual appeal to the board of education. This appeal, however, represents a review of what has previously occurred both procedurally and substantively. It has been found that the inclusion of this "fundamental fairness" doctrine at the local school level has worked to avoid further appeals either to the office of superintendent, the board of education or to a court of law. Many violations will result in an automatic suspension. Many times the student and/or parent will not contest guilt but may want to contest the length of suspension. The "evidentiary hearing" most certainly can be waived by the student and parents if they have no evidence to present and are agreeable to your proposed disposition of the disciplinary problem. Be sure, however, to obtain a written waiver of the hearing because failure to provide this procedural due process at the local school level will be fatal if your case is challenged. Another

important note in regard to the Lopez decision is that if you were directly involved in the alleged incident then you should not be the one to sit in judgment as to the guilt or innocence of that student. In this case, you should appoint your assistant principal or a classroom teacher to conduct the hearing, as you will obviously be an adverse witness.

As to the issue of corporal punishment (which is quite prominent in elementary, as opposed to secondary, schools) in a North Carolina case the issue was whether a mother had a fundamental right as a parent to decide the method of punishment for her child. The U. S. Supreme Court held that this right is not fundamental and the state need only show a legitimate and substantial state interest in utilizing corporal punishment. The Court concluded that the state's legitimate and substantial interest in maintaining order and discipline in the public schools outweighed the parent's right to determine what, if any, disciplinary measures would be used. The Court specifically found as follows:

> "So long as the force used is reasonable, and that is all the statute here allows, school officials are free to employ corporal punishment for disciplinary purposes until, in the exercise of their own professional judgment or in response to concerted pressure from imposing parents, they decide that its harm outweighs its utility."

The Court further set out some guiding principles regarding the use of corporal punishment. Your school district should have a corporal punishment regulation setting out at least these minimal guidelines.

1. Corporal punishment must be generally approved by the principal before it is used in a particular school and taking this one step further it should in effect be approved by the superintendent and the board of education.

2. Except for those acts of misconduct that are so anti-social or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed beforehand that specific misbehavior would result in its use. Also, subject to the same exception, corporal punishment should never be employed as a first line of punishment.

3. Corporal punishment must be administered by a teacher or principal in the presence of another teacher or official who must be told in the student's presence the reason for the punishment before the punishment is administered. The student need not be afforded a formal opportunity to present his side to the second official.

4. An official who has administered corporal punishment must provide the child's parents upon request a written explanation of his reasons and the name of the second official who was present. Further, in this regard a report should be made to the appropriate central office in regard to the punishment so administered so that same can be appropriately filed in the student's personal record.

Additionally, the Supreme Court ruled that corporal punishment per se does not constitute cruel and unusual punishment. In Oklahoma there is in Section 98 of the Oklahoma School Code specific statutory authorization for the use of corporal punishment. Section 99 establishes certain privacy rights between the teacher and the student. Section 630 is the Oklahoma Child Beating Statute and Section 631 provides a

basic exception for teachers in certain situations. Also, Section 97 protects the teacher from assaults by parents or other persons.

Consider the following: An irate phone call comes from a parent who is complaining of Mrs. Jones, the third grade teacher, for being particularly harsh and uncourteous towards the parents' third grade child. The parent desires that this teacher be dismissed and requests the immediate supervisor to take appropriate action. What should occur? Obviously, initially, the administrator should proceed to investigate the situation and should request the parent to come in for a conference between the administrator, the teacher and the parent. If the parent continues to complain, request that he prepare a complaint in writing. Upon receipt of this complaint, immediately provide a copy to the teacher involved and submit a copy of the superintendent or other immediate superior. Then a more through investigation can be conducted and a report made to the parent. If the grievance continues and the parent is still unsatisfied with the determination, then the parent's alternative is to proceed to the board of education. Of course, if the complaint is found to be valid it could be the basis for termination of that teacher. This relates directly to having the complaint in writing. Many parents who call up and complain one day seem to have forgotten about the next, and the administrator finds himself in a situation of proceeding toward a teacher termination

hearing without a valid witness or complainant. This raises the subject of evaluations of teaching personnel. The principal should be charged with the job of evaluating those instructors under his supervision. A strong evaluation system is absolutely necessary if the school district plans to sustain its decision to terminate a teacher. Accordingly, the district must rely upon the administrator as the appropriate and competent individual to conduct these evaluations. A particular teacher's personnel file should reflect action taken.

An article entitled "The Forgotten Position," dealt with the position of teaching principal. Many administrators occupy the statutory position of teaching principal. It is defined the Oklahoma School Code as a principal who devotes at least one-half the time school is in session to classroom teaching. This is important because it means that the teaching principal is first a principal and second a teacher. Additionally, teaching principals are not necessarily required to hold administrative certificates. The position of teaching principal is largely an economic one, as many school districts cannot afford to employ a full time elementary principal. This is unfortunate. It has been my experience in working with administrators that it is very difficult to perform the work load now required of an administrator on a half-time basis.

Further the teaching principal presents an impossible situation as to evaluation since the administrator would be expected to evaluate himself. In this situation the secondary

principal would have to be called upon to evaluate the teaching performance of the teaching part of the job (and he may not be competent in the elementary area make such a determination). Many teaching principals, because of their capacity as classroom teachers, forget to exercise their evaluation powers as to the other fulltime teachers within their school. Typically, too the distinction between labor and management becomes confused, not only in the area of evaluations, but in the area of professional negotiations. Teaching principal, where do your loyalties lie? It must be to one or the other. It is strongly suggested to boards of education and to administrators as well to "woo" each other. Principals should be made to feel very much part of management and should, on a regular basis, attend administrators, staff and board of education meetings in order to understand management viewpoint. Boards must get their principals involved in management decisions and assure them a place on the management team. In a small school district where the board must come up with a three-person negotiating team, the superintendent, the secondary principal and the elementary principal are the three obvious participants. There is a bill currently before the legislature which is designed to permit principals to organize and negotiate on their own. This bill obviously is directed and designed for two systems in the state, Oklahoma City and Tulsa. It has been amended to include all school districts.

CHAPTER SIX

"WHAT'S NEGOTIABLE?"

The subject of "Scope of Negotiations" has been described by Myron Lieberman as "The Long Gray List."

In Oklahoma, we have what is referred to as a "Meet and Confer" negotiations law. One section of that law (Title 70, Oklahoma Statutes, Section 509.6) states as follows"

> "The board of education and the representatives of the organization must negotiate in good faith on items effecting the performance of professional services."
> (emphasis mine)

The Kansas Supreme Court has discussed what is negotiable under its statute--"terms and conditions of professional service." The Court stated that such a provision means more than wages and hours, but something less than the board's educational policies. The Court further stated that what is involved is a "case by case" assessment of an item's direct impact on the well being of the individual teacher. Apparently if it has a direct impact, it is negotiable, and it is not negotiable if its effect is on the operation of the school system as a whole.

In three rulings handed down by the New Jersey Supreme Court in the latter part of 1973, the Court held that school districts have the right to effect administrative reorganizations and make calendar changes unilaterally, without prior

negotiation with teacher representatives. The Court also held that local school boards must negotiate with teachers as to working hours.

In the landmark 1966 North Dearborn Heights decision out of Michigan, the provision "wages, hours and other conditions of employment" was interpreted as including the following specific subjects:

> Information that the teacher organization may need in order to negotiate intelligently and police the contract.
>
> Compensative release time for teachers to serve on committees, agencies and other bodies created by the school board.
>
> The right of organizational representatives to come on school property in order to investigate teacher conditions and problems.
>
> The right of teacher organizations to appear on the agenda for school board meetings.
>
> The right of teachers to appeal from discharges and demotions.
>
> The right of teachers to evaluate curriculum and class schedules.
>
> Class size, selection of textbooks, materials and supplies.
>
> Planning of facilities and special educational programs.
>
> Establishment of in-service teacher training.
>
> Procedures for rating teacher effectiveness and severance pay.

The Trial Examiner in the North Dearborn Heights case concluded that the school board's refusal to discuss these

matters constituted an unfair labor practice. Since that decision was handed down, there have been virtually no cases defining the phrase "terms or conditions of employment" with the exception of the Kansas case heretofore noted. There is, of course, the 1972 decision of New York which involved the validity of five provisions which had been included in a collective negotiations agreement between the association and the school board. The first two concerned reimbursement for job related personal property damage and the third, partial tuition reimbursement for graduate study, the fourth, a salary increase in the final year of employment prior to retirement and the fifth, the arbitration of disciplinary actions taken against tenured teachers. The question before the Court was whether or not these disputed items constituted "terms or conditions of employment." The Court had very little difficulty in answering this question in the affirmative.

I recently had a list of articles of negotiation presented to me to determine which ones were <u>not</u> negotiable. The list included the following items:

1. Class size
2. Two days emergency leave
3. Full salary protection insurance
4. Grievance procedure
5. Salaries
6. Full single policy health insurance or that amount accredited to family plan
7. Professional leave.

It is obvious that as far as our jurisdiction is concerned, class size is not within the scope of negotiations. Although

it may be considered "within" in other jurisdictions, in Oklahoma class size is statutory as the legislature dictates minimum and maximum class sizes. Typically, we assume that that which the legislature dictates will not be negotiated. In that regard we have also been in the unusual situation during the course of the past three years (and we will see it again this year) where the legislature in Oklahoma has mandated a salary increase. These salary increases have been quite lucrative and increments at the local school district level are beginning to become a thing of the past because the legislature is putting the school districts into a situation where all monies they have available must go towards meeting the legislative mandate. Associations continue to negotiate for additional increments above and beyond the mandated salary increase.

One item to remember is that in a proposal or a certain article of negotiation, there should be included specific justification for that particular proposal. Working conditions are generally conceded to be negotiable, but then the problem exists as to what constitutes "working conditions." The term is somewhat nebulous. Perhaps job descriptions and definitions would be of assistance in defining "working conditions" and how they might be applicable under certain circumstances. Certainly it is preferable to refer to the phrase "terms of employment" linking directly to the contractual agreement between the employee and the employer, i.e, what items

pertain to the initial employment contract. Moreover, all items that would normally and reasonabl pertain to the contract would be items of negotiations. For example, a rule of "professional growth" (continuing education) would be a negotiated item, not so much as to whether or not the teacher wants to dictate what that rule will be, but whether or not the rule would be applicable to the teacher pursuant to the terms of employment. Another related item would be residential requirements concerning whether or not teachers would be required to live within the district as a condition of employment. Fringe benefit items such as insurance, various type of leave periods and extra duty stipends are obviously negotiable in most cases.

In conclusion, the scope of negotiations is somewhat an "experience" process. While the board is responsible for policy input, policy matters should be directed to employee committee tables as opposed to the employee-employer bargaining table.

CHAPTER SEVEN

WETZEL V. LIBERTY MUTUAL INSURANCE COMPANY: AN ANALYSIS

> "The District Court's Order was not appealable as a final decision under Section 1291."

Title 28,U.S.C., Section 1291 provides in part as follows:

> "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . . .except where a direct review may be had in Supreme Court."

Many people anticipated that the Wetzel case had decided once and for all the following question: Is sick leave payable for maternity leave when a school district (or other public or private employer) is paying sick leave for such temporary disablilities as broken legs, vasectomies or hysterectomies, but separately classifying pregnancy pursuant to the Equal Protection Clause argument dictated in Geduldig v. Aiello, 42 L.W. 4905 (June 17, 1974)? Respondent Wetzel had filed a complaint alleging that the Liberty Mutual Insurance Company' employee insurance benefits and maternity leave regulations discriminated against its women employees in violation of Title VII of the Civil Rights Act of 1964. The respondent sought injunctive relief, damages, costs and attorney fees. After ruling in the respondent's favor on their Motion For a Partial Summary Judgment on the issue of Liberty Mutual's liability under the Act, the District Court upon denying

petitioner's motion for reconsideration, issued an Amended Order stating that injunctive relief would be withheld because petitioner, Liberty Mutual Insurance Company had filed an appeal and had asked for a stay of any injunction. The Court of Appeals, Third Circuit, holding that it had jurisdiction of petitioner's appeal pursuant to Title 28, U.S.C., Section 1291, affirmed the District Court decision on its merits. The United States Supreme Court disagreed with the Third Circuit's determination that the District Court's rendering of a partial summary judgment was an appealable order pursuant to Section 1291. Essentially, the Supreme Court stated that the District Court did not respond and accordingly, did not finally dispose of any of Wetzel's prayers for relief, although concurrently finding the existence of liability as to the insurance company. The Supreme Court vacated the Court of Appeals judgment with instructions to dismiss the petitioner's appeal. Accordingly, there continues to be confusion as to the state of the law in regard to the payment of sick leave benefits to an employee on maternity leave.

The Geduldig case was decided upon the basis of the Equal Protection Clause of the United States Constitution. The Court stated:

> "The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all, citing Dandridge v. Williams, 397 U.S. 471, 486-487."

In its Amicus Curiae Brief filed in the Geduldig case, the United States Equal Employment Commission stated as follows:

> "It is important to remember especially in the cost context that if an employee is bein paid his regular pay while disabled he cannot collect disability pay. Therefore it follows that any alleged financial burden on the state will be greatly diminished when employers adhere to Title VII and treat pregnancy related disabilities the same as other disabilities or allowing women to use accumulated sick leave and possibly annual leave as well."

The Geduldig case relied heavily upon the cost factor as a practical matter.

To avoid unnecessary confusion here, it should be remembered that the Wetzel case involved two different decisions by two different panels within the Third Circuit. The portion of the District Court's order concerning petitioner's hiring and promotion policies was separately appealed to a different panel of the Court of Appeals. The judgment rendered by the Third Circuit upon that appeal was not considered by the court at 44 L.W. 4350 (March 23, 1976) that case having had Cert. Denied at 421 U.S. 1011, (1975) see 508 F.2d 239. The case considered by the Supreme Court as to the appealable order issue is found at 511 F.2d 199 (1975). The Court of Appeals here held that a private employer's income protection plan, which expressly excluded pregnancy benefits, but included all other disabilities, violated the Equal Employment

provisions of the Civil Rights Act. Liberty Mutual had the additional "interesting" policy in regard to maternity leave, that required female employees to return to work within three months after child birth or face termination. This provision was also found to be a violation of the Civil Rights Act.

Simply stated, the Court of Appeals held that since the employer provided leaves for all other temporary disabilities of employees, it was required to provide leaves for pregnancy on the same basis. Further, any monies payable for disabilities must apply to all disabilities, including pregnancy.

Wetzel had proceeded through the administrative process of the EEOC and had received a "right to sue" letter. On February 28, 1972, Wetzel commenced a class action on behalf of all female employees of Liberty Mutual alleging that the company's hiring and promotion policies and its pregnancy related policy violated Title VII. The statutory authority provided is 42 U.S.C., Section 2000(E-5(e).

As to Geduldig, the Supreme Court relied heavily on the fact that California's program was totally self-supporting, never drawing on general State Revenues. This obviously would be distinguishable from school systems. The Court of Appeals further distinguished Geduldig, indicating that California's program provided that only normal pregnancy and delivery disabilities were excluded from the benefits, while Liberty Mutual excluded all pregnancy related disabilities. I question that particular distinction being dispositive of Geduldig,

but the Court went on to say:

> "It is worthy of note that at oral argument, appellant's counsel declared that the company's income protection plan would not cover a disability suffered by a pregnant woman, but would have covered disability had the woman not been pregnant."

This appears to have been the "clincher." The Court further stated:

> "Under the pertinent guidelines (see 29 C.F.R., Section 1604.9, 1604.10) it is discriminatory to treat pregnancy differently from any other temporary disabilities." 29 C.F.R., Section 1604.10(B).

Liberty Mutual expressly excluded all pregnancy disabilities from coverage under its plan, while at the same time covered all other disabilities, except those voluntarily inflicted. Hence, another inquiry that has been propounded previously, but defeated posthumously. Liberty Mutual in that regard argued that pregnancy is voluntary and illnesses are not. The court reacted:

> "Voluntariness is no basis to justify disparate treatment of pregnancy, there are a great many activities that people participate in that involve a recognized risk. Most people undertake these activities with full knowledge of the potential harm. Drinking intoxicating beverages, smoking, skiing, handball and tennis are all types of activities in which one could sustain harm."

Obviously, a more important point is that temporary disabilities such as vasectomies and hysterectomies are voluntary as well. It could not be argued that a broken leg is voluntary, but the end result of the broken leg could come from a voluntary activity, such as skiing.

The "sickness" argument was next raised, Liberty Mutual stating that the plan covered only those disabilities arising from sickness and because pregnancy is not a sickness, it is properly excluded form coverage. The court again disagreed saying:

> "We believe that pregnancy should be treated as any other temporary disability. . . . .a woman disabled by pregnancy has much in common with a person disabled by a temporary illness. They both suffer a loss of income because of absence form work, they both incur medical expenses and the pregnant woman will probably have hospitalization expenses while the other person may have none, choosing to convalesce at home."

The Court summed up by saying:

> "Thus pregnancy is no different than any other temporary disability under an income protection plan offered to help employees through the financially difficult times caused by illness."

Finally, the appellant raised the cost factor, but apparently failed to provide appropriate statistical information from which the court could conclude that the increased cost for pregnancy benefits would be "devastating." (Somewhat akin to "shocking the conscience") The Court indicated that it

would result in an increased premium, but determined that the "integrity" of the plan would not be jeopardized. Further, the Court pointed out that pursuant to 29 C.F.R., Section 1604.9(E), cost is no defense under Title VII to this particular issue.

Although I am not satisfied that Geduldig was appropriately distinguished by the Court, one must be aware of the dicate of the law in regard to Title VII. I think perhaps that Aiello chose an inappropriate route to pursue relief as opposed to Wetzel, who proceeded via the administrative process of the Equal Employment Opportunity Commission. Remember also that there were three dissenting Justices in Geduldig.

The District Court decision in Wetzel is found at 372 F.Supp. 1146 (U.S.D.C., W.D., Pa. Jan. 9, 1974), (motion to reconsider determined February 20, 1974). It is interesting then, that Geduldig was not decided prior to the District Court decision in Wetzel, although the District Court did cite the Lower Court decision, Aiello v. Hanson, 359 F.Supp. 792 (N.D. Calif. 1973) which was reversed by the United States Supreme Court. In retrospect then, one wonders if Geduldig had been reversed prior to the District Court decision, if it would had mattered to Judge Webber's thinking. Upon reviewing his decision, I think not.

Consider the "intent and purpose" of "sick leave" . . . . Oklahoma defines it as "compensation for illness" either as to the employee or members of the immediate family. Further,

however, our state gives discretion to the District in providing an extended "medical" plan for its employees, which obviously could include maternity leave. As the court indicated, pregnancy may well result in more expense to the employer than the typical illness would.

The safe approach to the problem, at least from a "cost" basis, would be to not pay for any temporary disabilities. It your district is arguing "cost", but continues to pay for "other" disabilities which do not really fall within the definition of "sick leave", then th r argument obviously will be weakened before the bench. Further, again reiterating the "cost" factor, if an employee wo.'s until child birth and returns after a normal recovery period of 4 to 6 weeks, then you are only talking about 20 to 30 days paid leave, assuming the employee has accumulated that much time. Subsequent to normal recovery, the employee, if desiring to remain on leave, commences "child-care leave" which is not payable under any circumstances.

The Court failed to properly distinguish Geduldig! The "Classification" based upon the "contribution/cost theory" appears sound and reasonable.

On the other hand, the purpose and intent of the "compensation as to absence for cause" theory propounds again, sound and reasonable.

Judge Webber did inadvertently, while referring to Dandridge v. Williams, state that while a fixed state policy

of classification may survive an equal protection attack, it may still be violative of Title VII.

The Court said:

> "Because pregnancy is a natural, expectable, and societally necessary condition . . . it is not a voluntary condition."

Judge Webber strayed for a moment and stated:

> "It might appear to the lay mind that we are treading on the brink of a precipice of absurdity . . . If you can think of something which is inextricably related to some other thing and not think of the other thing. . . you have a legal mind!"

CHAPTER EIGHT

"THE IMPARTIAL TRIBUNAL DOCTRINE"

On the 28th day of March, 1975, the Supreme Court of Wisconsin handed down a landmark decision in the area of school law. This decision is not final since the United States Supreme Court has agreed to hear the case and render a decision. The Hortonville Education Association v. Hortonville Joint School District No. 1, et al., 225 N.W. 2d 658 (Wis. 1975) case stands for the proposition of the "impartial tribunal" doctrine, i.e., once a board of education has been determined to be in an adversary position, then it cannot be regarded as a neutral party and accordingly, any hearing pursuant to a teacher termination conducted by that board would constitute a violation of due process of law under the United States Constitution. The case dealt with teachers who had gone on strike in direct violation of Wisconsin law. The board of education thereafter conducted individual disciplinary hearings. The teachers' union contended that the board was not sufficiently impartial properly to discipline the teachers. The Court of Appeals upheld the teachers position.

In the Hortonville case, there had been an illegal teachers strike. The board of education acted in issuing notice of proposed dismissal to each of the teachers involved and subsequently, pursuant to the request of the teachers, con-

ducted a hearing and determined that each teacher should in fact be and was dismissed. The Wisconsin Court went on to say that the appropriate relief in such a situation would be a "de novo" hearing of all issues in any court of record in the county where the school district is located, the issues to be determined by the court without a jury, unless the judge decides to call a jury in an advisory capacity.

Under Oklahoma law as to the termination of a tenured teacher, whether that termination is a dismissal or a non-renewal, the initial hearing before the local board of education constitutes a contest between the school administration and the teacher with the school board representing the "impartial tribunal." From that point on, pursuant to an appeal to the Professional Practices Commission and on to the State Board of Education, the teacher and the school board become adversaries. Interestingly enough, pursuant to a Petition For Reivew filed with the District Court of Oklahoma County contesting an order of the State Board of Education, the teacher or board and the State Board of Education become adversaries.

Under law, as to a dismissal (immediate firing), notice is given as to a "proposed dismissal" and a hearing must be had at which time the determination will be made "final" by the local board of education. As to a non-renewal, a final determination is made by the board "ex parte" prior to April 10. A subsequent hearing would only occur when requested by

the teacher and that hearing constitutes a "reconsideration" as opposed to an initial final determination. As a practical matter, once a school board decides to issue a notice of proposed dismissal, the decision to fire has been made. So, in reality, there is very little distinction between the two proceedings, except that pursuant to a non-renewal, the teacher is permitted to complete his current contract. Taking this one step further, pursuant to a hearing as to either a dismissal or non-renewal, it could be assumed that the school board at that point in time, actually constitutes an "adversary" to the teacher and pursuant to the Hortonville theory, such a hearing is violative of due process of law. This is an interesting idea. If a teacher opted to proceed directly into Court from time of notice, the doctrine of "exhaustion of administrative remedies" could well be raised and pursuant to the recent Martin v. Harrah ruling in the Oklahoma State Supreme Court, the doctrine could be found valid to curtail the teacher's remedy within the District Court. On the other hand, and pursuant to the Hortonville theory, it appears that if the board proceeds to conduct a hearing, then it subjects itself to the possibility of a finding that it violated the teacher's due process and immediate reinstatement and back pay would be appropriate and applicable.

To extend the "impartial tribunal" doctrine one more step, the present makeup of the Professional Practices Commission clearly indicates that the Commission no more represents

an "impartial tribunal," than a local board of education. Consequently, it is possible that the board of education could pursue relief in a court of competent jurisdiction from a Commission ruling, except that due process law applies to an individual and not to a public governing entity.

If the United States Supreme Court sustains the decision in Hortonville, it would seem to remove the local board of education and possibly the Professional Practices Commission from the proceedings as required in Oklahoma's Teacher Tenure Law (Title 70, O.S., Section 6-122).

Oklahoma has one Federal Court decision which debated the "impartial tribunal" theory relative to the termination of a school superintendent. In that case, the Federal District Court held that only the local board of education would be competent to make such a determination as to its executive officer. This would follow even if it were proven that one or more members of the board of education was prejudiced and biased prior to the actual hearing.

Hortonville, if nothing else, emphasizes the need for a drastic change in Oklahoma's Teacher Tenure Law, which now requires three separate administrative hearings followed by an extensive review procedure within the Courts. Once a board of education has decided to terminate a teacher one way or the other, that board clearly stands in an adversary position to that teacher. Accordingly, the issue should be litigated before an impartial tribunal, one which clearly represents

a neutral interest in the matter. This would not necessarily have to be a court of law, but could be an appointed administrative hearing officer or fact-finding panel. A review could be lodged in the appropriate District Court by the aggrieved party.

CHAPTER NINE

LEGAL LIABILITY OF INDIVIDUAL BOARD MEMBERS

One could not approach this topic without referring initially to the case of Wood v. Strickland, 95 S.Ct. 992 (1975). Fortunately, we have the Honorable G. Ross Smith of Arkansas on this panel, who was the attorney for the defense in the Wood case.

It would be somewhat ludicrous for me to discuss this "full employment" case except to reiterate the information provided to the Council of School Attorneys last year at Miami Beach.

If one reviews the "headnotes" of Wood, he finds the following:

1. It is not the role of the Federal Courts to set aside decisions of school administrators which the Court may view as lacking in wisdom or compassion.

2. Public high school students have substantive and procedural rights while at school.

3. The Civil Rights Act does not extend the right to relitigate in Federal Court evidentiary questions arising in school disciplinary proceedings, or the proper construction of school regulations, and is not intended to be a vehicle for Federal Court correction of errors in the exercise of school official's discretion that do not rise to the level of violations of specific constitutional guarantees.

4. Public school officials must have a degree of immunity from damage suits under the Civil Rights Act if the work of the schools is to go forward; and, however worded, the immunity must be such that school officials understand that action taken in the good faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances, will not be punished and that they need not exercise their discretion with undue timidity.

5. In respect to the immunity of school administrators and school board members from awards of damages under the Civil Rights Act, the appropriate standard necessarily contains both "objective" and "subjective" elements; the official must himself be acting sincerely and with the belief that what he is doint is right; but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law, on the part of one entrusted with the supervision of students' daily lives, than by the presence of actual malice.

6. To be entitled to a special exemption from the categorical remedial language of the Civil Rights Act in a case in which his action has violated a student's constitutional rights, a school board member who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissable intentions, but also on the knowledge of the basic unquestioned constitutional rights

of his charges.

7. While on the basis of common law tradition and public policy, school officials are entitled to a qualified good faith immunity from liability for damages under the Civil Rights Act, they are not immune from such liability if they knew or reasonably should have known that the action they took within their sphere of official responsibility would violate the constitutional rights of the student effected; or if they took the action with malicious intent to cause a deprivation of such rights or other injury to the student; a compensatory award is appropriate only if the officials acted with such an impermissable motiviation or with such disregard of students clearly established constitutional rights that their action could not reasonably be characterized as in good faith.

What has happened since Strickland? It has been the general consensus of most courts that school boards are not "persons" within the statute providing that every person who under color of state law subjects one to deprivation of rights, shall be liable to the party injured. See 42 USCA, Section 1983, 28 USCA, Sections 1343, 1343 (3), Atkins v. Duvall County School Board, 511 F.2d 690 (CA Fla. 1975). Obviously, such a determination leaves those individuals serving on a school board or in their respective school official capacity, standing alone, subject to the dictates of Wood v. Strickland. In Keckeisen v. Independent School District 612, 509 F.2d 1062 (CA Minn. 1975) the Eleventh Amendment was discussed and the

court held:

> "Although states are given immunity by the Eleventh Amendment from prosecution of civil claims, individuals and associations acting under color of state law are not immune to sanctions of the Civil Rights Act and may be sued, unless it is clear that the claim is actually a ruse by which personal jurisdiction over the state is sought to be exercised."

Essentially, this decision held that a school district was in fact a "person" within the purview of 42 USCA, Section 1983.

The Supreme Court denied certiorari in the Florida case, Daye v. Bounds, 509 F.2d 66, Cert. Den. 95 S.Ct. 2404, wherein the Circuit Court held that a state was not a "person" within the Federal Civil Rights statute proscribing the deprivation of rights. Oklahoma and the Tenth Circuit Court have held with Florida as to the concept of a municipal corporation not being a "person" within the contemplation of Sections 1983 and 1985, governing conspiratorial and substantive civil rights offenses. See Shadid v. Oklahoma City, 494 F.2d 1267 (CA Okla. 1974). In further support of the Florida decision, see Patton v. Conrad Area School District, 388 F. Supp. 410 (DC Del. 1975) and State of Louisiana Ex Rel Purkey v. Ciolino, 393 F.Supp. 102 (DC La. 1975) and Booth v. Prince Georges County Maryland, 66 FRD 466 (DC Ma. 1975).

A case in New York held that a suit could be brought against public officials to enjoin them from invading constitutional

rights, see Bouffier v. Frank, 389 F.Supp 502 (DC N.Y. 1975). Conversely, in Sullivan v. Mead County Independent School District No. 101, 387 F.Supp. 1237 (DCSD 1975) the Court held that a school district was not a "person" within the Civil Rights Act and that a teacher could not maintain an action under the act against the school district for declaratory and injunctive relief as to her dismissal. The Court, however, did say that individual members of the board of education were subject to suit under the Civil Rights Act in an action challenging the dismissal of the teacher. The question then is raised, if individuals are sued for injunctive relief, for example "reinstatement," could the Court order individual members of the board to reinstate a teacher since, typically, individual members of the board have no power or authority, except in session as an official board of education. See also Wright v. Houston Independent School District, 393 F.Supp. 1149 (DC Tex. 1975). Texas, by the way, generally follows the premise that a school district is not a "person" within the meaning of the Civil Rights statutes. See Harkless v. Sweeney Independent School District, 388 F. Supp. 738 (DC Tex. 1975).

In conclusion, I might review for you a case that I defended, Fanning v. The School Board of Independent School District No. 23, 395 F.Supp. 18 (USDC WD. Okla. 1975). In this case a non-tenured teacher whose contract was not renewed, brought a civil rights action against the school board and two

administrators. The Federal District Court refused to hear the case on the grounds of the theory of abstention since no Federal questions were involved. The Court did make several comments which are worthy of note. One issue was whether a decision of the school board to not renew a non-tenured teacher's contract based on the recommendations of school administrators, deprived the teacher of rights arising under Federal law if the administrators were improperly motivated. The Court answered this question:

> "First, the administrators while cloaked with only some degree of immunity are not members of the school board. They have only the power to recommend and not the power to decide. The fact that the board scrutinizes these recommendations is in itself a safeguard of plaintiff's rights. The distinct power of the administrator to submit an adverse recommendation has always been recognized as the zenith of discretion, which is why it is merely a recommendation. If the board has not renewed a contract because of the administrator's recommendation which is based on a impermissable intent, then the primary failure is that of the board in not doing what it was established to do, so only the board has the power to decide on continuing employment."

Additionally, the Court stated:

> "The individual board member's actions must be based on permissable intentions and on the knowledge of the basic and unquestioned constitutional rights of those whom the member affects in his official capacity."

Obviously, one can read into this decision the premise of Wood v. Strickland.

The problem appears to be school officials being subject to such a liability award, i.e., the prospect thereof, as opposed to actual proof to substantiate the premise of malicious intent. It is my supposition that Wood v. Strickland, as opposed to being the lawyer's "full employment" case could be termed the insurance company's "full employment" case.

CHAPTER TEN

STUDENTS

A. THE GOSS DOCTRINE

The United States Supreme Court in Goss v. Lopez (43 L.W. 4181, January 22, 1975) held that before a student is suspended for any length of time, the student and his parents must be provided notice, provided an opportunity to review and present evidence and have an opportunity to respond to the charges at an "evidentiary hearing" conducted before a school administrator.

In attempting to define what is meant by an "evidentiary hearing," the Court indicated that it must be something less than a formalized due process hearing. Normally, a parental conference includes more of a "rehabilitative" atmosphere as the student concerned has essentially been assumed guilty of the violation. The "formalized" hearing would normally include permitting legal counsel for the student and more strict rules of evidence utilized, to-wit, the presentation of oral testimony from witnesses who can testify directly as to the incident in question; further, the student would not be required to "take the witness stand."

In Boykins v. Fairfield Board of Education (492 F.2d 697, 1974), the Fifth Circuit Court of Appeals talked of an informal student evidentiary hearing and indicated that the

utilization of written statements during the course of the school official's evidentiary hearing would be permissible. This is known as the "flexibility" policy. Boykins also indicated that "basic fairness and integrity of the fact-finding process are the guiding stars."

The exception to the Lopez rule should be noted here. When, in the school official's judgment, the continued presence of the student on campus would result in a dangerous and/or disruptive situation, then that student may be immediately removed prior to the evidentiary hearing, but in such a case, the student's case must be heard within 72 hours of his removal.

Accordingly, here follow some recommendations as to the conduct of the initial evidentiary hearing. It is important to note that we are not discussing the appeal process; but rather, we are discussing the opportunity to determine guilt or innocence and if appropriate, the imposition of reasonable punishment.

1. The school official conducting the hearing should be one who was not involved in any way as to the alleged incident;
2. Written documentation should be provided to both the student and his parents as to (a) the alleged violation; (b) what type of evidence supports the violation; and (c) when the evidentiary hearing will be conducted;

3. The school official should conduct the proceedings in an informal manner and encourage communication exchange between the student, his parents, the testifying witnesses and the school official himself. Utilization of written statements requires that copies of same be provided in advance to the student and his parents;
4. Once all appropriate evidence has been heard, then a decision must be issued in writing and appeal rights provided the student and his parents. If the student and his parents indicate their desire to appeal the decision, then the student will remain in school until final disposition of the matter is had by the Board of Education.

Here, we are talking only about "procedure". Obviously, before any procedural due process is applicable, the school district must first have promulgated an effective "Student Code of Conduct" and have such "Code" distributed to all students and their parents. Restrictions and prohibitions must be made perfectly clear to the students.

Finally, the imposition of punishment must be fair, reasonable, and "fit the crime." Often the appeals do not challenge "guilt," but do challenge the length of suspension given. A student's past "record" cannot be used in determining "guilt," but it can be used in determining extent of punishment so long as the student and his parents are aware of the "basis" of such determination.

The "burdens" of Lopez may be difficult and time-consuming, but fairness in regard to student disciplinary matters is an important consideration and it appears to be what our system of justice considers important. Always remember that to be "procedurally correct" means that the "merits" of the case will not be defeated.

B. STUDENT ADMISSION POLICIES

The recent United States Supreme Court decision in Goss v. Lopez emphasized that a student may not be denied his constitutional right to a free public education except upon just cause. Exclusion from school in any event would require an "evidentiary hearing" prior to any suspension being imposed. (See, French, "The Second School Administrator's Legal Handbook, Chap. 2, O.U. Law Center, 1975). A related issue is that of "admission" to school.

The basic statutory right is found in Title 70, Oklahoma Statutes, 1971, §1-114, wherein it is stated as follows:

> "All children between the ages of 5 years on or before November 1 and 21 years on or before September 1 shall be entitled to attend school free of charge in the district in which they reside."

In construing this particular provision, the Attorney General, on April 20, 1959, in an opinion issued to the Honorable Oliver Hodge, State Superintendent of Public Instruction, held as follows:

> "A child cannot be refused admission to school solely because he was expelled in another district, but may be so refused if he is of a licentious or immoral character."

It has been the practice among school districts to refuse admission to a child if that child has been suspended from another district. Obviously, unless a child is a legal resident of a particular school district, then that school dis-

trict must refuse admission. If, however, the child obtains legal residence within that school district, then it would appear, pursuant to said opinion, that the fact that the child was suspended or expelled in another district is not alone "just cause" to refuse admission. Pursuant to Title 70, Oklahoma Statutes, §§8-101 et. seq., with the approval of both boards of education, however, a child may be permitted admission regardless of residential requirements. If, however, the board of education refuses to accept, then legal residence must be established in order for that student to attend that particular school.

Accordingly, it is essential for a school district to promulgate rules and regulations as to admission to school. "Conditional requirements as to admission" may well include physical examinations, tuition payments, age and classification requirements and finally, residential requirements. Such items as class "fees" would only constitute a "pre-requisite" as to the particular class involved. Basically, there is not much difference between "refusal to admit" and "suspension from school" after a student has been admitted. The basic difference, if any, is found in the fact that once admitted the student subjects himself to all student behavioral rules and regulations, but is not subject to them prior to admission. Litigation involving admission to school is extremely limited. In 1971, there was local litigation involving the admission of a student to an institution of higher education. The college

involved had a rule that admission could be refused if the student was found to be "socially unacceptable." Pursuant to negotiations between the parties, it was determined that this rule was vague and arbitrary and could not be reasonably enforced and accordingly, the student was admitted.

In the opinion heretofore cited, the Attorney General did hold that

> "A school district may refuse to permit a child to attend school on a tuition basis because of the child's expulsion from another school or for any other reason." (emphasis added)

Accordingly, it would appear that on a tuition basis, admission is strictly within the discretion of the school district. This does not apply, however, to the situation where the child is a resident of that district. He can only then be excluded or refused admission upon just cause relating to his character. Obviously, expulsion or suspension from another school would relate to the child's character. Further problems would exist as to the conduct of a hearing prior to admission, since prior to admission the child and/or his parents are not necessarily subject to the school's jurisdiction. This could be questioned, however, in that residence within a school district would subject the child and his parents to the school's jurisdiction, even though actual enrollment had not occurred.

In conclusion, student admission procedures and policies should be stated in each school district's rules and regulations. There is very little difference between "refusal to admit" and "suspension from school" once the child is a bona

fide resident of that district. Exclusion from school in any regard constitutes a deprivation of a constitutional and statutory right and cannot be permitted except upon "just and proper cause."

STUDENT ADMISSION POLICY

Every student of legal public school age as defined by Title 70, §1-116, and who is a legal resident of this school district, or whose transfer has been approved by this board, is basically eligible to attend school here, but must, prior to admission meet all conditions of enrollment and general qualifications as are delineated herein.

A. BASIC ELIGIBILITY:

(1) Legal Residence (2) Legally transferred

B. CONDITIONS OF ENROLLMENT:

(1) Tuition (2) Physical Examination

(3) Special and Lab fees (Specific Classes Only)

C. GENERAL QUALIFICATIONS:

(1) Age (2) Satisfaction of prior schooling (grade level)

(3) Behavior record (licentious/immoral)

(4) Academic

C. LEGALITY OF SEARCHING SCHOOL PARKING LOTS

Although it has long been clear that student lockers may be legally searched, a new question has recently arisen as to whether student automobiles which are parked upon school property may legally be searched. Obviously, a school district is responsible for and has authority to regulate school district parking lots and in that regard could regulate the use thereof and order removal of cars from them when it is warranted. However, as to the actual searching of such a vehicle, unless consent is given by the student, civil authorities should be contacted to carry out any search that may be required. The distinction is that a student owns his locker only as opposed to other students and not the school district; but a student and/or his parents own the car as opposed to the school district. The student does subject himself to reasonable rules and regulations regarding the use of school property but probably not to the extent of a search without warrant.